CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 130

INDIANAPOLIS BREWING COMPANY, INC.,
APPELLANT,

vs.

THE LIQUOR CONTROL COMMISSION OF THE
STATE OF MICHIGAN ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF MICHIGAN

FILED JUNE 18, 1938.

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[fol. 1]

IN UNITED STATES DISTRICT COURT, FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

In Equity. No. —

Indianapolis Brewing Company, Inc., an Indiana Corporation, Plaintiff,

vs.

The Liquor Control Commission of the State of Michigan; Edward W. McFarland, Hale G. Knight, and Verold F. Gormely, Individually and as Members of the Liquor Control Commission of the State of Michigan; Frank Murphy and Leon D. Case, Individually and as Members Ex-Officio of the Liquor Control Commission of the State of Michigan; Raymond W. Starr, Individually and as Attorney General of the State of Michigan, Defendants

Bill of Complaint—Filed December 10, 1937

To the Honorable Judges of the District Court of the United States for the Eastern District of Michigan, Southern Division:

The plaintiff, Indianapolis Brewing Company, Inc., complains of the defendants above named, and each of them in their several capacities above set forth, and alleges and shows unto the Court the following facts:

Clause One

Plaintiff, Indianapolis Brewing Company, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana, having its principal office and place of business in the City of Indianapolis, County of Marion, in said State, is a citizen and resident of said State, and is not a citizen or resident of the State of Michigan, the Eastern District of Michigan, or the Southern Division of [fol. 2] said Eastern District.

Clause Two

A. The defendant, the Liquor Control Commission of the State of Michigan, hereinafter sometimes referred to as the "Commission", is the duly organized and existing authority created by Act No. 8, of the Public Acts of the Extra Session of 1933 of the State of Michigan, as amended by Act No. 241 of the Public Acts of 1935, and Act No. 281 of the Public Acts of 1937 of said State, all of which acts are hereinafter sometimes referred to as the "Liquor Control Acts", and by said laws and statutes is vested with the sole right, power and duty to control the alcoholic beverage traffic and traffic in other alcoholic liquor within the said State of Michigan, and is charged with the enforcement and administration of said laws and statutes. Said commission, whose members are those persons hereinafter mentioned, is a citizen and resident of the City of Lansing, County of Ingham, State of Michigan, and is a citizen and resident of the Eastern District of Michigan, Southern Division thereof.

B. The defendant, Edward W. McFarland, is now and since on or about the 10th day of March, 1937, has been a duly appointed, qualified and acting member of said Commission, and the Chairman thereof, and is to hold such office for approximately two years from said date; said defendant McFarland is a citizen and resident of the City of Detroit, County of Wayne, State of Michigan, and is a citizen and resident of the Eastern District of Michigan, Southern Division thereof.

C. The defendant, Hale G. Knight, is now and since about the 15th day of March, 1937, has been a duly appointed, qualified and acting member of said Commission and is to hold such office until the 15th day of December, 1937; said [fol. 3] defendant Knight is a citizen and resident of the above mentioned City of Detroit, in said Eastern District of Michigan, Southern Division thereof.

D. The defendant, Verold F. Gormely, is now and since about the 1st day of March, 1937, has been a duly appointed, qualified and acting member of said Commission and is to hold such office until approximately three years from said date; said defendant Gormely is a citizen and resident of the City of Lansing, County of Ingham, State of Michigan, and is a citizen and resident of the Eastern District of Michigan, Southern Division thereof.

E. The defendant, Frank Murphy, is the duly elected qualified and acting Governor of the State of Michigan, and is the executive head of the government of the State of Michigan, and possesses, and is charged with and exercises, by virtue of the various laws of said State, a dominating control over the administration and enforcement of such laws, and particularly of those certain laws and statutes of said State above referred to, in paragraph "A" hereof, as the Liquor Control Acts, the first of which was approved and has been in force and effect since the day of December 15, 1933, and the subsequent amendments thereto, all of which are more particularly referred to hereinafter. Said defendant, Frank Murphy, by virtue of his office of Governor of the State of Michigan, is, under the provision of said Liquor Control Acts, a member ex-officio of the said Liquor Control Commission and as such possesses and is charged with certain additional powers and duties in connection with the enforcement and administration of said Liquor Control Acts. Said defendant is a citizen and resident of the State of Michigan, in the Eastern District of said State of Michigan, Southern Division thereof.

F. The defendant, Leon D. Case, is the duly elected, qualified and acting Secretary of State of the State of Michi- [fol. 4] gan, and by virtue of his office as Secretary of State, is, under the provisions of said Liquor Control Acts, a member ex-officio of said Liquor Control Commission, and as such possesses and is charged with certain powers and duties in connection with the enforcement and administration of said Liquor Control Acts. Said defendant, Case, is a citizen and resident of Watervliet, County of Berrien, State of Michigan, and is a citizen and resident of the Western District of Michigan, Southern Division thereof.

G. The defendant, Raymond W. Starr, is the duly elected, qualified and acting Attorney General of the State of Michigan, and is the principal legal officer of said State, and is charged with the enforcement of the laws of said State, particularly said Liquor Control Acts and certain acts related thereto, hereinafter more particularly referred to. Said defendant is the legal adviser and counsellor of the Liquor Control Commission and the members thereof, of the Governor and Secretary of State. Said defendant, Starr, is a citizen and resident of the State of Michigan, Western District of said State of Michigan, and the Southern Division of said Western District.

Clause Three

A. Said plaintiff is, and prior to and since about the 1st day of January, 1935, has been, duly authorized to conduct and has engaged in the business of the manufacture and sale of alcoholic malt beverages, and other lawful lines of business allied therewith in the State of Indiana. Plaintiff now owns and operates, and since said date has owned and operated, a plant in said State of Indiana wherein it manufactures and has manufactured alcoholic malt beverages, which it has sold and is selling in many parts of the United States where such sales are lawful, including the State of Michigan, in which state its sales are made to persons duly licensed by the above mentioned Liquor Control Commis- [fol. 5] sion of the State of Michigan, and in accordance with and in pursuance of a certain Seller's Beer License No. 14 issued to it by said Commission, which said license is at present still owned and held by plaintiff, a copy of which is attached hereto and marked Exhibit "A", and made a part hereof.

B. Each and all said sales have been consummated on written, telegraphic, or telephonic orders from plaintiff's customers in said State to plaintiff in the State of Indiana. Such orders have been in all cases accepted by plaintiff in said State of Indiana, and call for delivery either under direction of plaintiff or its customer at said customer's place of business, or other designated destination, in the State of Michigan. The title to said beer and malt beverages so purchased, and each specific purchase, passes to the customers from plaintiff, upon receipt of same by said customer at its place of business or designated destination in the said State of Michigan. Plaintiff has at all times in the conduct of its business complied with the laws of the United States, of the State of Indiana, and of the State of Michigan pertaining thereto.

C. In the conduct of its business as hereinbefore stated, plaintiff has during the past several years sold large quantities of its products to duly licensed wholesalers and distributors in the State of Michigan. The approximate value of the plaintiff's products so sold is as follows:

For the year 1935	$44,654.85
For the year 1936	44,838.91
For the year 1937 (10 months)	37,995.59
Total	$127,489.35

Clause Four

The jurisdiction of this Court is based upon the following:

[fol. 6] This is a suit of a civil nature in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3000.), and is wholly between citizens of different states and can be fully determined as between them.

Clause Five

The jurisdiction of this Court is also invoked because and by reason of certain Federal questions involved, in this, to wit: The validity of said Liquor Control Acts, particularly section 40 of Act No. 281 of Public Acts of 1937, and the regulations issued and about to be issued thereunder, are put in question on the grounds that they violate, and at the time of the enactment and promulgation thereof, did violate, or will violate, the provisions of Section Eight (8) of Article One (I) (being what is commonly known as the Commerce Clause) of the Constitution of the United States; the Fourteenth (14th) Amendment to the Constitution of the United States; and sections 41, 42, and 43, Title 8 of the United States Code, being those provisions of the certain statutes of the United States known as the civil and property rights statutes; Section Ten (10) of Article I, and Section Two (2) of Article IV of the Constitution of the United States.

Clause Six

A. There is involved in this controversy the right of the plaintiff to sell, transport and deliver in interstate commerce to purchasers in the State of Michigan, beer and other alcoholic malt beverages manufactured by it in the State of Indiana for sale in the several United States including said State of Michigan, free from the unlawfully discriminatory provisions and onerous burdens imposed by said Liquor Control Acts. The right of plaintiff to sell and [fol. 7] to continue to sell their products in interstate commerce and to transport and import and continue to transport and import the same into the State of Michigan for sale and delivery to purchasers in said State of Michigan free from such unlawful burdens and discriminatory provisions of said Acts is of a value greatly in excess of the sum of Ten Thousand ($10,000) Dollars; the value of the product of plaintiff which it does now and will annually sell in interstate commerce and transport into the State of Michigan free from such unlawful burdens and discriminatory provisions is greatly in excess of the sum of Ten Thousand ($10,000) Dollars; the value of the beer and malt beverages which plaintiff has heretofore manufactured in the State of Indiana and has transported into and sold in the State of Michigan is greatly in excess of the sum of One Hundred Thousand ($100,000) Dollars. Plaintiff's right to have defendants restrained from enforcing said Liquor Control Acts against plaintiff is of a value greatly in excess of Ten Thousand ($10,000) Dollars, and the value of plaintiff's business and good will in the State of Michigan, which will be destroyed if the enforcement of said Acts against plaintiff is not restrained and enjoined, is vastly in excess of the sum of Ten Thousand ($10,000) Dollars.

B. Plaintiff, by reason of the quality of its product and by great expenditure of money, by advertising, solicitation and through other means, has, over a period of the past three years, developed and enjoys a large demand and sale for its beers and alcoholic malt beverage, and a valuable good will and a valuable sales and distribution system in the State of Michigan, and plaintiff has contracts with numerous employes and others who are engaged in the manufacture of its products in the State of Indiana, and in the transportation, distribution, and sale of same in the State of Michigan. There exists in said State of Michigan [fol. 8] a large demand on the part of numerous consumers, retail dealers, and wholesale dealers for the products manufactured and sold by plaintiff, and but for the matters and things hereinafter complained of, said plaintiff could and would continue to market and sell in the State of Michigan as it has heretofore done a considerable portion of its products and of the total amount of beer and other alcoholic malt beverages sold in said State.

Clause Seven

A. The Liquor Control Act of the State of Michigan was originally enacted as Act No. 8 of the Public Acts of the Extra Session of 1933 of the State of Michigan, in pursuance of an amendment to the Constitution of 1908 of said

State. Said amendment, duly adopted in November 1932, and being section 11 of Article XVI of said Constitution is in words and figures as follows:

"Sec. 11. The legislature may by law establish a liquor control commission, who, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this state, including the retail sales thereof; and the legislature may also provide for an excise tax on such sales: Providing, however, that neither the legislature nor such commission may authorize the manufacture or sale of alcoholic beverages in any county in which the electors thereof, by a majority vote, shall prohibit the same."

B. The said Act No. 8 of the Public Acts of the Extra Session of 1933 is entitled as follows:

"An act to create a liquor control commission for the control of the alcoholic beverage traffic within the state of Michigan, and to prescribe its powers, duties and limita- [fol. 9] tions; to provide for the control of the alcoholic liquor traffic within the state of Michigan and the establishment of state liquor stores, to provide for the licensing and taxation thereof; and the disposition of the moneys received under this act; to provide for the enforcement and to prescribe penalties for violations of this act: to provide for the confiscation and disposition of property seized under the provisions of this act; to provide a referendum in certain cases; and to repeal certain acts and parts of acts, general, local and special, and certain ordinances and parts of ordinances."

C. The title and certain sections, including section 40, of said Act No. 8 were amended subsequently by Act No. 281 of the Public Acts of 1937 of the State of Michigan. Said amended title is as follows:

"An act to create a liquor control commission for the control of the alcoholic beverage traffic within the state of Michigan, and to prescribe its powers, duties and limitations; to provide for the control of the alcoholic liquor traffic within the state of Michigan and the establishment of state liquor stores; to provide for the incorporation of farmer cooperative wineries and the granting of certain rights and privileges thereto; to provide for the licensing and taxation thereof, and the disposition of the moneys received under this act; to provide for the enforcement and to prescribe penalties for violations of this act; to provide for the confiscation and disposition of property seized under the provisions of this act; to provide a refer- [fol. 10] endum in certain cases; and to repeal certain acts and parts of acts, general, local and special, and certain ordinances and parts of ordinances."

and said amended section 40 reads as follows:

"Sec. 40. Beer; taxation and discrimination. There shall be levied and collected by the commission on all beer manufactured and/or sold in this state a tax at the rate of one dollar and twenty-five cents per barrel if sold in bulk, and in like ratio if sold in smaller quantities, the payment of which shall be evidenced by excise tax beer stamps, caps, lids, or crowns as prescribed by the Michigan liquor control commission, affixed to the barrel, keg, case, or other container, as the case may be by the brewer if manufactured in this state, unless otherwise provided by the commission with respect to beer manufactured within this state, or by the wholesaler or the person from whom purchased if manufactured outside this state, whichever shall be designated by the commission, before sale thereof within this state by said wholesaler: Provided, however, That the tax imposed by this act upon beer manufactured in or imported into this state shall be rebated to such manufacturer or wholesaler upon satisfactory proof being furnished to the commission by affidavit or otherwise, as the commission may determine, that such beer was shipped out of the state for sale and consumption outside the state of Michigan.

"For purposes of taxation a barrel shall be construed to contain thirty-one gallons.

"Any manufacturer duly licensed as aforesaid and who [fol. 11] has paid said license fee shall be exempt from payment of any tax imposed under the provisions of act number one hundred of the public acts of nineteen hundred thirty-one or amendments thereto, commonly known as the malt tax act, for all malt products taxed by said act used in its manufacturing process.

"The commission shall forthwith adopt a regulation designating the states, the laws, or the rules or regulations of which are found to require a licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in this state; or which deny the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license; or which prohibit licensed wholesalers of beer therein from possessing or selling beer purchased in this state, unless the one from whom purchased has secured a license and paid a fee therein, when such seller neither transports the beer into said state nor sells the same therein; or which impose any higher taxes or inspection fees upon beer manufactured in this state when transporting into or sold therein, than is imposed upon beer manufactured and sold within said state, the regulation adopted shall prohibit all licensees from purchasing, receiving, possessing, or selling any beer manufactured in any state therein designated, said regulation to become effective ninety days after its adoption. Any licensee or person adversely affected shall be entitled to review by certiorari to the proper court the question as to whether the commission has acted illegally or in excess [fol. 12] of authority in making its finding with respect to any state."

D. Section 21 of Article V of the Constitution of 1908 of the State of Michigan pertaining to the enactment and validity of statutes provides in part as follows:

"No law shall embrace more than one object, which shall be expressed in its title."

E. Section 16 of Article II of the Constitution of 1908 of the State of Michigan, provides in part as follows:

"No person shall * * * be deprived of life, liberty or property, without due process of law."

Clause Eight

A. Purporting to act under and in pursuance of the authority of said Liquor Control Acts, and particularly section 40, of Act No. 281, of the Public Acts of 1937, those defendants, who are members of the Commission, assuming to act as The Liquor Control Commission of the State of Michigan, have determined that certain of the laws, rules and regulations in force in the State of Indiana are discriminatory laws as defined by said section 40, and said defendants are threatening to and are forthwith about to prepare and adopt a regulation designating the said State of Indiana to be a state whose laws discriminate against the State of Michigan within the meaning of said section 40, and unless this Court lends its aid, said defendants will forthwith adopt such regulation prohibiting the purchasing, receiving, possessing, or selling of any beer manufactured in the State of Indiana, including plaintiff's products. In particular the laws, rules and regulations of Indiana above referred to are Chapter 226, Acts of 1935 as amended by Chapter 197, Acts of 1937, and rules and regulations made in pursuance thereof, all of which are herein incorporated [fol. 13] by reference as though herein set out in full.

B. Said defendants assuming to act as the Liquor Control Commission and under the supposed authority of said section 40 are about to enforce and administer the provisions of said section by forthwith adopting the regulation hereinabove mentioned; and unless restrained by this Court will forthwith adopt such regulation and will immediately notify all of its licensees, including plaintiff's customers, that ninety days subsequent to the adoption of said regulation, it will be unlawful to purchase, receive, possess, or sell any beer manufactured in the State of Indiana, including therein the products of plaintiff.

C. It is the purpose, intent and threat of the said defendants, assuming to act as and for the Liquor Control Commission, their agents, representatives, and subordinates, to enforce against the plaintiff, its agents, servants, and customers, the provisions of said section 40 and to prohibit the purchase, receipt, possession, and sale of plaintiff's product upon pain of various penalties, fines, imprisonment, and various forfeitures and seizures of property of plaintiff and its customers, including the cancel-ation of licenses issued by said Commission, as provided for by the laws of the State of Michigan, particularly the said Liquor Control Acts and Act No. 389 of the Public Acts of 1925 of the State of Michigan, as amended (sections 8309, et seq., Compiled Laws of 1929), and the rules and regulations of said Commission, and thus involve the plaintiff, its officers, agents, servants, and customers in numerous suits and threaten it with the disorganization and destruction, by frightening, intimidating, and threatening its customers in this State, of its business, the loss of its customers, and the depreciation and destruction of its good will and property, all to the irreparable damage of the plaintiff, which said damage would be incapable of admeasurement and adjudication in an action at law.

[fol. 14] D. The threatened action of the Commission has already caused and will continue to cause the disorganization and destruction of plaintiff's business in this State, for the reason that its customers are now refusing and will continue to refuse to purchase its product for fear of the fines, penalties and forfeitures to which they may be subjected on account of such allegedly unlawful acts; and the crystalization of such threats into a regulation will serve to greatly accentuate the fear of plaintiff's customers to purchase its product, and will result in the total destruction of plaintiff's trade. The value of the business of plaintiff, its good will and profits th[illegible] already destroyed, and which will continue to be destroyed by the threats and acts of the defendants are speculative and incapable of ascertainment.

Clause Nine

There are numerous other states in the United States, including Illinois, Maryland, Kentucky, Massachusetts and Missouri which have not been designated by said Commission as being discriminatory within the meaning of said section 40, nor does said Commission have any intent to so designate them. In these said states there are numerous persons and corporations engaged in the manufacture of alcoholic malt beverages and beer who sell their products throughout the United States wherever such sale is lawful, including the State of Michigan. Said manufacturers will be free to continue to import and sell within the State of Michigan such products which have been and are now in competition with those manufactured by plaintiff and sold by it in said State of Michigan. The State of Indiana is the only state which defendants threaten to and are forthwith about to designate as discriminatory within said section 40, and upon information and belief, said state is [fol. 15] the only state which said defendants will and intend to so designate.

Clause Ten

The plaintiff owns and operates a brewery or place of manufacture in the State of Indiana, and now sells and desires to and will continue to sell its products to customers in this State, and, in order to do so, to negotiate in interstate commerce the sale of same, and to transport or cause to be transported the same in interstate commerce. The beer and alcoholic malt beverages manufactured, marketed or handled by plaintiff are such beverages as are referred to in the Liquor Control Acts, particularly the aforementioned section 40, as "beer," and are such beverages, the manufacture and sale of which are made legal and authorized and sought to be controlled by said Acts.

Clause Eleven

Said Liquor Control Acts, particularly said section 40 thereof, are in violation of the Constitution of the United States and therefore invalid and void for the following reasons:

A. Said Liquor Control Acts, particularly said section 40, violate Section 8 of Article I of the Constitution of the United States, which, among other things, provides: "The Congress shall have the power * * * to regulate commerce * * * among the several states * * *," because same constitute an attempt by the State of Michigan to regulate and prohibit interstate commerce and constitutes an undue, and unlawful burden and restriction upon interstate commerce and because the State of Michigan has, by said Liquor Control Acts usurped the power of the Federal Congress over interstate commerce, and because said Liquor Control Acts are not uniform in their operation upon interstate commerce, and because said Liquor Control Acts provide that the importation into or purchase, receipt, possession or sale in Michigan of beer manufactured in Indiana shall be prohibited, while the importa-[fol. 16] tion into, purchase, receipt, possession and sale in Michigan of beer manufactured in other States, such as Illinois, Kentucky, Maryland, Massachusetts and Missouri is and shall be permitted by said Liquor Control Acts, and because said Liquor Control Acts arbitrarily make classifications without any reasonable or justifiable basis therefor, as herein set out, and because said Liquor Control Acts are an unreasonable exercise of the police power, since said Liquor Control Acts are not designed to promote any purpose of or to protect public health, morals, welfare or safety. The Twenty-First Amendment to the

Constitution of the United States, which, among other things, provides: "The transportation or importation into any state, territory or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof is hereby prohibited," was intended only to protect those states which prohibit or restrict the manufacture, sale, use and possession of intoxicating liquors, and was not intended to take from the Federal Congress jurisdiction over interstate commerce in intoxicating liquors between such states as have by their laws made intoxicating liquor a lawful commodity.

B. Said Liquor Control Acts violate Section 10 of Article I of the Constitution of the United States, which, among other things, provides: "No State shall * * * pass any *ex post facto* law or law impairing the obligation of contracts," in that said Liquor Control Acts make the possession of alcoholic liquors lawfully acquired and possessed unlawful and are retroactive in their operation upon such alcoholic liquors, and in that said Liquor Control Acts impair the obligation of plaintiff's contracts with its employes, agents and customers respecting the importation into and sale of plaintiff's products in the State of Michigan, since said Liquor Control Acts render performance [fol. 17] of such contracts as applied to the State of Michigan illegal. Said Liquor Control Acts also impair the obligation of plaintiff's contract with the Liquor Control Commission of the State of Michigan, by virtue of which contract plaintiff is authorized to import into and sell in the State of Michigan its products, and to continue to do so. Said Liquor Control Acts also impair the obligations of the contracts between plaintiff's customers in the State of Michigan and the said Commission, by virtue of which contracts said customers are authorized to import, receive, possess and sell plaintiff's products in this State, and to continue to do so.

C. Said Liquor Control Acts violate Section 2 of Article IV of the Constitution of the United States, which, among other things, provides: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," because said Liquor Control Acts and their operation deny to this plaintiff, as a citizen and resident of the State of Indiana the privileges and immunities which are enjoyed in the State of Michigan by citizens of other States, such as the States of Illinois, Kentucky, Maryland, Massachusetts and Missouri, and because said Liquor Control Acts thereby constitute legislation which discriminates against plaintiff, in violation of its constitutional rights, and because said Liquor Control Acts create and constitute classes and distinctions without any reasonable or justifiable basis therefor, as herein set out, and because the purpose of said Liquor Control Acts is not to promote any purpose of public health, morals, welfare or safety in the State of Michigan, but is designed and calculated to retaliate against citizens of those States wherein laws discriminating against beer manufactured in Michigan have allegedly been passed, and to favor unlawfully citizens of the State of Michigan.

D. Said Liquor Control Acts violate the Fourteenth [fol. 18] Amendment to the Constitution of the United States, which, among other things, provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law," in that the passage and enforcement of said Liquor Control Acts against plaintiff will destroy plaintiff's business in Michigan, as aforesaid, and thereby deprive plaintiff of its property without due process of law, and thereby confiscate plaintiff's property in Michigan. Said Liquor Control Acts do not constitute due process of law because said Liquor Control Acts are not general in their operation, but operate only against the importation of beer and only against the imporation of beer from States designated and to be designated by the Liquor Control Commission of the State of Michigan as having laws, rules or regulations discriminating against beer produced in the State of Michigan, and because said Liquor Control Acts constitute class legislation, as herein set out, and because said Liquor Control Acts destroy plaintiff's right to make contracts without any reasonable basis, and because said Liquor Control Acts destroy plaintiff's rights to enforce contracts already made without any reasonable basis, and because said Liquor Control Acts deprive plaintiff of its right to acquire and possess property, and because said Liquor Control

Acts make unreasonable classifications, and because said Liquor Control Acts make possession or sale of merchandise, previously lawful to possess and sell, unlawful, and because said Liquor Control Acts confiscate and destroy plaintiff's property by legislative enactment, and because the laws of the State of Michigan make any place in Michigan where beer manufactured in Indiana is received, possessed or sold, a nuisance, whereas such places do not and [fol. 19] will not constitute nuisances as a matter of fact, and because said Liquor Control Acts confiscate and destroy plaintiff's property and rights without a trial or a hearing and without employing any method of judicial procedure, and because said Liquor Control Acts make importation into the State of Michigan and possession in the State of Michigan of plaintiff's products unlawful, regardless of intent, and because said Liquor Control Acts delegate judicial powers to the Liquor Control Commission of the State of Michigan, which is not a judicial body, and because said Liquor Control Acts authorize the Liquor Control Commission of the State of Michigan to make findings of fact and law which operate upon plaintiff's rights and plaintiff's property without giving any previous notice to plaintiff, and without extending to plaintiff the opportunity of a hearing, and because said Liquor Control Acts delegate legislative powers to the Liquor Control Commission of the State of Michigan which is not a legislative body, and because said Liquor Control Acts delegate the legislative power of the State of Michigan to the law making bodies of the several other States of the United States, since the law making bodies of such other States can, by passing or repealing laws in such other States, make acts in the State of Michigan lawful or unlawful, and because said Liquor Control Acts infringe and usurp the sovereign power of the several other States of the United States to construe and interpret their own laws, rules and regulations and to determine the validity and effect of the same and because said Liquor Control Acts create classifications between citizens and residents of the State of Michigan offering for sale, receiving or possessing beer manufactured in the State of Michigan and other citizens and residents of the State of Michigan offering for sale, receiving or possessing beer manufactured in other States, such as Illinois, Maryland and Kentucky, Massachusetts and Mis-

[fol. 20] souri, and because said Liquor Control Acts take and confiscate plaintiff's property in the State of Michigan without any compensation to plaintiff.

E. Said Liquor Control Acts violate the Fourteenth Amendment to the Constitution of the United States, which provides: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," in that said Liquor Control Acts constitute a law which abridges the privileges and immunities of plaintiff as a citizen of the United States and of the State of Indiana, in this, that said Liquor Control Acts abridge and destroy the right of plaintiff as a citizen of Indiana to conduct its business of manufacturing beer in the State of Indiana and transporting same into the State of Michigan for sale and use in said State, which said right, privilege and immunity is possessed by citizens of other States, such as the States of Illinois, Maryland, Kentucky, Massachusetts, Missouri, and Michigan and in this, that said Liquor Control Acts deprive plaintiff of its property without due process of law for the reasons aforesaid, and that said Liquor Control Acts deny to plaintiff the equal protection of the laws, in that they create unreasonable classifications and distinctions as aforesaid, and in that said Liquor Control Acts create a special privilege, right, immunity and benefit for the citizens of such other States as Illinois, Maryland, Massachusetts, Missouri, Kentucky, who are engaged in the manufacture of beer in such other States and the transportation of such products into the State of Michi-[fol. 21] gan for the purpose of sale and distribution in the State of Michigan.

F. The acts of Congress prohibiting the shipment in interstate commerce of alcoholic malt beverages, and alcoholic liquors from one State into another State, intended to be received, possessed, sold, or used in violation of the laws of said State, do not confer upon a State the power or right to discriminate injuriously against the products of other States as to such commodities, the manufacture, sale and use of which are not forbidden, and which are, therefore, the subject of legitimate commerce; the provisions of said Liquor Control Acts, as they relate to the importation of alcoholic malt beverages into the State of Michigan and to the transportation, possession and sale in the State of Michigan of such beverages produced without the State are invalid because grossly and injuriously discriminatory against the products of plaintiff, which are manufactured in another State and because they impose a direct burden upon interstate commerce, and because they constitute onerous, arbitrary and oppressive legislation, and because of other reasons hereinbefore alleged.

Clause Eleven (1)

Said Liquor Control Acts, particularly section 40 thereof, are also invalid because the evident purpose and intent thereof is to keep the beer products of the State of Indiana out of this State, and because insofar as this purpose is sought to be enacted by certain provisions in said laws, said provisions are not within the title of said Act and are therefore in violation of Section 21 of Article V of the Constitution of 1908 of the State of Michigan, and are therefore unconstitutional and void. Said legislation also violates the "due process" clause of Section 16 of Article II of the Constitution of 1908 of the State of Michigan, here- [fol. 22] inabove alleged.

Clause Twelve

In the State of Indiana there are numerous other manufacturers of beer who are in a situation similar to that of plaintiff, and plaintiff brings this action on behalf of such others so similarly situated, as well as itself, and the granting of an injunction by this Court against the enforcement of said Liquor Control Acts will prevent a multiplicity of suits and prosecutions which will otherwise arise in connection with the enforcement of said act.

Clause Thirteen

Defendants, and each of them, unless restrained and enjoined by this Court from so doing, will unlawfully harrass and threaten plaintiff and its customers and will enforce against it and others each and all the provisions of said Liquor Control Acts and cause the plaintiff great and irreparable damage and injury and result in the complete destruction and loss of plaintiff's business in the State of Michigan.

Clause Fourteen

A. Plaintiff has no adequate remedy at law and unless plaintiff is afforded the protection which only a court of equity can afford, plaintiff will be exposed to a multiplicity of suits, complaints and prosecutions, and will lose its customers in the State of Michigan, due to the fact that such persons as are now handling and desire to continue to handle beer manufactured by plaintiff for sale in the State of Michigan, already have, and will cease handling plaintiff's products because of fear of prosecution, penalties and forfeitures, and plaintiff's good will in the State of Michigan will be destroyed, and plaintiff's reputation and credit in the State of Michigan will be destroyed, and plaintiff's reputation and credit elsewhere will be damaged; and plain- [fol. 23] tiff's distribution system in the State of Michigan will be destroyed, and plaintiff's reputation will be damaged by reason of the institution of prosecutions and complaints, even if same are terminated favorably to plaintiff, and the demand in the State of Michigan for beer manufactured by plaintiff in the State of Indiana will immediately be destroyed and no further purchases of said proucts will be made by purchasers for resale within the State of Michigan, and plaintiff will suffer injuries, damage and losses which would not be subject to accurate and correct computation and would not be recoverable from any persons responsible therefor, and which damages could not be recompensed by money, and plaintiff will be compelled to submit to trespasses and invasions of the rights guaranteed to plaintiff under the before mentioned provisions of the Constitution of the United States.

B. In order to protect plaintiff's rights and property in the premises, a temporary restraining order should be issued immediately, restraining the defendants above named, and each and every one of them, from enforcing, attempting or endeavoring to enforce in any way the provisions of the said Liquor Control Acts insofar as they violate the Constitution of the U. S. and State of Michigan, and particularly, among other things, from enforcing, or attempting or endeavoring to enforce the provisions of section 40 of said Acts by adopting or attempting to adopt a regulation designating the State of Indiana as discriminatory within the meaning of said section or by any other means or method, because such action which defendants are threatening and are forthwith about to take will occur before due notice of this proceeding could be given or a hearing had thereon, and will cause plaintiff immediate irreparable loss, injury and damage as aforesaid.

Wherefore Plaintiff prays:

A. That writs of subpoena be issued, directed to defend- [fol. 24] ants, herein, requiring them to appear and make full, true and complete answer to this bill of complaint, but not under oath (answers under oath being expressly waived), and to abide by and perform such orders and decrees as the Court may make in the premises.

B. That the said Liquor Control Acts, particularly section 40, of Act No. 281, of the Public Acts of 1937 of the State of Michigan be declared, adjudged and decreed to be void because contrary to the rights of plaintiff under the Constitution and laws of the United States, and the Constitution of the State of Michigan, as hereinabove set forth.

C. That the defendants, and each of them, their respective assistants, appointees, employes and successors and each of them be enjoined from in any way or manner enforcing or attempting to enforce against this plaintiff and others similarly situated the provisions of said Liquor Control Acts and said section 40, insofar as they are invalid, and particularly, but not exclusively, from adopting or attempting to adopt a regulation in pursuance of said section designating Indiana as a discriminatory state within the terms of said section; and from attempting to enforce against plaintiff by adopting such regulation or otherwise, any of the provisions of said Act, and from harrassing, threatening, intimidating, and instituting or causing to be instituted any prosecutions or proceedings, civil or criminal, against plaintiff, its officers, agents, employes, customers, or any of them, in an attempt to enforce any of such provisions of said Liquor Control Acts.

D. That a temporary or interlocutory injunction issue out of this Court restraining and enjoining the defendants as aforesaid in paragraph "C" of plaintiff's prayer for relief, and that upon the final hearing of this cause, such injunction be made perpetual.

[fol. 25] E. That meanwhile, pending the hearing and determination of the application for such interlocutory injunction, to the end that plaintiff may not suffer an immediate, great and irreparable loss, this Court issue its temporary restraining order enjoining and restraining the defendants, and each of them, as aforesaid in paragraph "C" of plaintiff's prayer for relief.

F. That plaintiff may have such other and further relief in the premises as may seem just and equitable to this Court.

Indianapolis Brewing Company, Inc., by C. A. Frey. Harris W. Wienner, 1177 Penobscot Building, Detroit, Michigan, Tel.: Cherry 0632, Attorney for Plaintiff. McHale, Arthur & Myers, 1012 Chamber of Commerce Bldg., Indianapolis, Indiana; and Herbert J. Patrick, 1014 Chamber of Commerce Bldg., Indianapolis, Indiana, of Counsel.

[fol. 26] *Duly sworn to by C. A. Frey. Jurat omitted in printing.*

[fols. 27-30] EXHIBIT "A" TO BILL OF COMPLAINT

STATE OF MICHIGAN

Liquor Control Commission

License

No. 14.

14.
SB
L-101.

This Is To Certify, that a contract of license to sell Beer and/or Malt liquors to Michigan Liquor Control Commission wholesale permittees is hereby granted to Indianapolis Brewing Company, Inc., of 316 Agnes St., Indianapolis, County of Marion, State of Indiana.

This Contract License is granted under and in accordance with the provisions of Act No. 8, Public Acts of 1933, Extra Session, as amended, and shall continue and be in full force and effect until the first day of May, 1938, unless cancelled, revoked or declared null and void by the Liquor Control Commission previous to the said date above set out.

In Witness Whereof, the Liquor Control Commission has caused these presents to be duly signed and sealed, and the said Licensee has caused these presents to be duly signed and sealed.

Liquor Control Commission, (Signed) E. W. McFarland, Chairman. (L. S.) (Signed) L. D. Rahilly, Secretary. (L. S.)

Licensee Sign Here:

Indianapolis Brewing Co. Inc. (L. S.) (Signed) C. A. Frey Sec. & Treas. (Seal 1937 Seller Beer.)

Date License Issued: April 29, 1937.

FE.

[File endorsement omitted.]

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL BILL OF COMPLAINT—Filed December 20, 1937

To the Honorable Judges of the District Court of the United States for the Eastern District of Michigan, Southern Division:

The plaintiff, Indianapolis Brewing Company, Inc., by way of supplemental bill of complaint in the above entitled cause, further alleges and says:

Clause One

That said plaintiff, for the purposes of this supplemental bill of complaint, adopts all of the allegations of clauses one, two, three, four, five, six and seven, of said original bill of complaint, and all other allegations therein contained, which are material and applicable to the allegations of this supplemental bill of complaint.

Clause Two

And said plaintiff further says that said original bill [fol. 32] of complaint was duly filed in this Court on the 10th day of December, 1937, at which time this Court entered its order upon and against said defendants and each of them to show cause why, if any, a temporary restraining order, as prayed for in said original bill of complaint, should not be made and entered against said defendants and each of them, and this Court in said order further provided that a hearing on said application for a temporary restraining order should be held on Monday, the 20th day of December, 1937, at 9:30 o'clock A. M. of said day in open Court in the United States Courthouse and Post Office Building in the City of Detroit, Michigan, at which time the said defendants and each of them were required to appear and show cause, if any, why such temporary restraining order, as prayed for in said bill of complaint, should not be made and entered.

Clause Three

That a certified copy of said rule to show cause, as made and entered by this Court, was duly served on said defendants and each of them on the 13th and 14th days of December, 1937, but that in spite of such fact the said defendants in their official position as members, and constituting, the Liquor Control Commission of the State of Michigan on the 14th day of December, 1937, after the service of said certified copy of order to show cause upon them and each of them, in an effort to, and for the purpose of, defeating the purpose of this Court in conducting such proposed hearing on the matter of the issues of such temporary restraining order, made and adopted a regulation in the manner provided in said Section 40 of Act #281 of Public Acts of 1937 of the State of Michigan, designating the State of Indiana as a state of discrimination in the following words and figures to wit:

[fol. 33] "Pursuant to Act No. 8, Public Act, Extra Session of the year 1933 of the State of Michigan, as amended by Act No. 241 of the Public Act for the year 1935, and Act No. 281 of the Public Act for the year 1937, particularly Section 40 thereof, the Michigan Liquor Control Commission promulgates and adopts the following rule and regulation designating as discriminatory according to Section 40 of said Act the following States: Maine, Maryland, Nevada, Indiana, New Hampshire, North Carolina, Pennsylvania, Tennessee, Vermont, Washington. These designations are made after a careful examination of the laws and rules and regulations of the aforementioned states."

That as a result of the adoption of such regulation above set out, the importation, sale and possession of any and all alcoholic malt beverages, commonly known as beer, manufactured by this plaintiff in the State of Indiana and by all other manufacturers of such products similarly situated in said State of Indiana, will become unlawful on and after the 14th day of March, 1938. That by reason of such act no opportunity exists upon the part of this Court to restrain the adoption of such regulation but this plaintiff, in view of such change in situation as a result of the adoption of such regulation now alleges and says:

1. That since the adoption of such regulation the various distributors and retailers in the State of Michigan now and heretofore selling, handling, and dealing in the products of this plaintiff, manufactured in the State of Indiana, commonly known as beer, and of like products of all other manufacturers similarly situated in the State of Indiana, are and have been placed in a position that if the said defendants continue to follow the policy of said order and to communicate, advertise and issue statements and plans and announcements of intention to ~~carry out and~~ enforce the said regulation that the good will of the said alcoholic products produced in the State of Indiana and heretofore attached to them will become more and more discounted, impaired, disparaged and irreparably injured and destroyed and the [fol. 34] said wholesalers and distributors will seek to and will handle other beers not produced in the State of Indiana and, to advertise and seek to build up a trade in beers produced in the State of Michigan or the importation of which from other states is not subject to the said rule and regulation and that said wholesalers will in respect to the good will, custom and trade already established in dealing in said beers produced in the State of Indiana be greatly damaged and injured and the said plaintiff and manufacturers in its class in the State of Indiana will from day to day increasingly lose business, trade, custom and good will in respect to said beer. And that such damage is in the process of happening at the present time; and will continue to so happen increasingly from and after this date and long prior to the effective date of said regulation on the 14th day of March, 1938, unless said defendants and each of them, individually and collectively, are immediately restrained and enjoined from issuing any notices, communications, statements, threats, advices or announcements and from doing any of the things herein charged that said defendants will do, all of which damage which is now occurring and will

occur prior to said 14th day of March, 1938, is incapable of being measured in actual amounts and will be irreparable, and that this plaintiff and other manufacturers similarly situated, has as his sole and only remedy the action in this Court as herein prayed for.

2. And this plaintiff now shows to the Court that as a result of the adoption of such regulation various distributors and dealers of alcoholic malt beverages in the State of Michigan have become reluctant and apprehensive in the matter of purchasing the further products of this plaintiff and other manufacturers similarly situated in the State of Indiana during the said period of ninety days following the adoption of such regulation, which said reluc-[fol. 35] tance and apprehension will increase from time to time during said interim prior to the 14th day of March, 1938, because of the fact that among other things, the said distributors and retailers will be required within said period of ninety days to dispose of any such products of this plaintiff and other manufacturers in the State of Indiana prior to the expiration of said ninety days and will be required likewise, in order to maintain their said business in the State of Michigan, to make arrangements for the purchase of beer manufactured in the State of Michigan and in other states against which said regulation does not apply in order to take the place of and replace the beer heretofore and now being purchased from this plaintiff and other manufacturers similarly situated in the State of Indiana, and will, as a result thereof, proceed at once to sell on the market in the State of Michigan, at sacrifice prices, any and all such beer and alcoholic malt beverages which they now have on hand and which was produced by the plaintiff and others similarly situated in the State of Indiana, to their irreparable damage and injury and to the prejudice and irreparable damage of the relations between said plaintiff and said other persons in the same class with their purchasers, wholesalers, and distributors in the State of Michigan and to the irreparable damage to the good will and future business of said plaintiff and said other persons in the same class.

3. That the said defendants, individually and collectively, as members of the Liquor Control Commission of the State of Michigan, have threatened to and will, unless restrained and enjoined from so doing by this Court, immediately and

from time to time thereafter issue and promulgate, advertise and communicate, various orders, communications, advices, rules, regulations and supplemental orders and regulations during the said interim prior to the 14th day of March, 1938, for the purpose of carrying out, rendering effective [fol. 36] and making plans and arrangements to render effective said regulation adopted on December 14th, 1937, and hereinbefore set out, and for the purpose of further injuring and destroying the business and good will of this plaintiff and others similarly situated, and before any hearing can be had upon the application for a temporary injunction heretofore made by the original bill and this supplemental bill of complaint and all of which threatened acts on the prt of said defendants will irreparably damage and injure the said plaintiff and persons in its class and the business and good will of said plaintiff hereinbefore described and as to which loss and damage the said plaintiff and the said persons in its class will have no relief or means of recoupment unless the said restraining order be granted as herein prayed.

[fol. 37] Wherefore, in addition to such relief prayed for in the original bill of complaint herein, plaintiff prays that the defendants and each of them, individually, and as members of the Liquor Control Commission of the State of Michigan be immediately restrained and enjoined, until a hearing and determination can be had before this Court upon plaintiff's application for an interlocutory injunction from in any manner advertising, announcing, communicating or promulgating any further rules, regulations, notices, statements, communications, advices or threats to carry out or effect or to attempt to carry out or effect the regulations adopted by said Commission on the 14th day of December, 1937, or any part or parts thereof, and the policies and purposes and each of them of the said defendants herein complained of.

Indianapolis Brewing Company, Inc., an Indiana Corporation, by George Steinmetz, V. Pres., Plaintiff. Harris W. Wienner, 1177 Penobscot Bldg., Detroit, Mich., Attorney for Plaintiff. McHale, Arthur & Myers, 1012 Chamber of Commerce Bldg., Indianapolis, Indiana, and Herbert J. Patrick, 1014 Chamber of Commerce Bldg., Indianapolis, Indiana, Of Counsel.

[fols. 38-40] *Duly sworn to by George Steinmetz. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENTS TO BILL OF COMPLAINT AND SUPPLEMENTAL BILL OF COMPLAINT—Filed December 27, 1937

To the Honorable Judges of the District Court of the United States for the Eastern District of Michigan, Southern Division:

Now comes Indianapolis Brewing Company, Inc., the above named plaintiff and hereby amends its Bill of Complaint and Supplemental Bill of Complaint heretofore filed in this cause, in the following manner, and alleges:

I

Paragraph D of Clause Eight of said Bill of Complaint is hereby amended by eliminating from the second last line thereof the word "speculative" and inserting in its place and stead the words "incapable of admeasurement".

II

Paragraph F of Clause Eleven of said Bill of Complaint is hereby amended by inserting in the first line thereof after "Congress", the words "and the Constitution of the United States, as amended".

[fol. 42] III

Clause Eleven of said Bill of Complaint is hereby amended by adding thereto a paragraph to be designated as paragraph "G", which paragraph is, as follows:

"G. The plaintiff alleges further; that said Section 40 of the said Public Act Number 8 of the extra session of the State of Michigan, as amended by Act No. 281 of the Public Acts of 1937 of the State of Michigan, and the said statutes of the State of Michigan herein referred to severally and operating and construed together, are not a lawful exercise of the sovereignty of said State of Michigan and their respective enactments excee[illegible] and *and* do now exceed the power and authority of [illegible]tate, or under the Twenty-first Amendment to the Co[illegible]tion of the United States or by virtue of any permission or grant of power to said State under last said amendment and each of said Acts and said Acts operating together deprive the plaintiff and persons in plaintiff's class of property and of the said business, good will, rights, contracts, immunities and privileges belonging to and now enjoyed by plaintiff, herein described, in contravention of the Fourteenth Amendment to the Constitution of the United States, and further deny the equal *rp*otection of the law in contravention of the said Fourteenth Amendment and also violate the provisions of Article I, Section 8 of the Constitution of the United States, and abridge the privileges and immunities of the said plaintiff and the persons in plaintiff's class in violation of said Fourteenth Amendment in each of the following respects and particulars, to-wit:

1. Section 40 of said Public Act No. 8 of the State of Michigan as amended by the said Public Act No. 281 of the Public Acts of the State of Michigan, 1937, above set out, arbitrarily [fol. 43] and unreasonably requires the exclusion of the beer, manufactured in the State of Indiana by plaintiff or persons in plaintiff's class, from the State of Michigan and prohibits the presence of said beer so produced within the State of Michigan for a cause and reason not appertaining to or related in any wise to public order, morals, health or welfare of the people of the State of Michigan or to the enforcement of any law or laws relating thereto; and the said Public Act of the State of Michigan herein complained of is without discernible public object; and,

2. The said amended Act complained of herein prescribes and enacts that the admission or exclusion of the said product manufactured in the State of Indiana, shall be based wholly upon whether or not the State of Indiana shall have in force a law or laws containing provisions which do not conform to the standards described in the said Public Act of the State of Michigan, which basis for the admission or exclusion of the said product, manufactured in the State of Indiana, from the State of Michigan is arbitrary, unreasonable, artificial and without relation to the public welfare, order, morals, health or happiness of the people of the State of Michigan.

3. The application and enforcement of the said two standards contained in said Act for the exclusion or admission of said products, and the statutory requirement thereof, constitutes an artificial and unjust classification in that all beer manufactured outside of the State of Michigan, is for the said purposes divided into two classes, namely, beer pro-[fol. 44] duced in States, the laws of which conform to the said provisions contained in said Public Act of the State of Michigan, and beer manufactured in States the laws of which do not conform to said provisions prescribed in said Public Act, which classification is unjust, unreasonable, arbitrary and is not based upon any essential difference in the product produced, in the qualifications of competency of those producing such beer; and the said classification of said beer by said artificial standards, results in the creation of two classes of manufacturer, the one class consisting of those manufacturing beer in States, the laws of which conform to the said provisions contained in said Public Act of the State of Michigan, and the other class manufacturing beer in States the laws of which do not conform to the said provisions, which classifications is unjust, unreasonable, arbitrary and without any discernible public object or relation to the control of the liquor traffic by the State of Michigan and said Act accords to the one class of said manufacturers, in respect to the shipment and sale of the beer produced by them in a State or States, the laws of which conform to said provisions, rights, privileges, the continued enjoyment of business and good will in the shipment and sale of said product, which are by said Public Act denied to the other class of said manufacturers in respect to the shipment into and sale in the State of Michigan of beer produced by said class of manufacturers in a State or States the laws of which do not conform to said provisions prescribed by the said Public Act; and said classification, while extending to one of said classes of manufacturers the equal protection of the laws of the State of Michigan in respect to the movement into and sale within Michigan of the beer by said manufacturers produced, denies to the other class of manufacturers, the protec-[fol. 45] tion of said laws in respect to the movement into and sale within Michigan of the beer produced by last said manufacturers.

4. That the true purpose and inevitable effect of the said statute herein complained of, and the enforcement thereof

and of the standards therein contained and described above, is to establish and maintain in the future an economic barrier against beer produced in Indiana and in other States, the laws of which do not conform to the said provisions and to constrain and require wholesalers, distributors and other licensees and consumers within the State of Michigan not to purchase, possess or consume beer produced in Indiana and in other States, the laws of which do not conform to said provisions, and to project the legislation of the State of Michigan within the borders of another State of the Union of States constituting the United States of America and to constrain and hamper the State of Indiana and the other States of said Union in the enactment and enforcement of laws relating to their domestic policy in respect to the alcoholic traffic contrary to the constitutional relationship of the said States under the said constitutional provisions and amendments herein invoked, on behalf of the said plaintiff and persons in the same class with plaintiff and contrary to and in violation of the rights of the said respect- States of the Union and of the rights, privileges and immunities of their citizens under said constitutional provisions; and which law and laws of the State of Michigan herein complained of are without other discernible purpose or object, and which said legislation complained of further violates the constitutional rights of the licensed wholesalers and distributors within the State of Michigan under the constitutional provisions of the Federal Constitution herein set out and for the same reasons herein set out showing the violation of the constitu-ional rights of this plaintiff and persons in plaintiff's class; and further in violation of the [fol. 46] said provisions of the Constitution deprives the wholesalers and distributors, licensees under the laws of the State of Michigan, who are in respect to said beer produced by this plaintiff and persons in plaintiff's class, customers of said plaintiff and of last said persons, and as to which said beer produced by said plaintiff and others in said plaintiff's class, the said distributors and wholesalers have built up through advertisements, sales efforts, and the investment of their monies, a valuable good will in business, and of which they will each be deprived by the said laws of Michigan herein complained of if the interlocutory injunction and final injunction herein prayed are denied and through the said injury and impairment and unlawful invasions of said rights of the said wholesalers, distributors and consumers of the said plaintiff and of persons in plaintiff's class, in the handling and sale of the beer by said plaintiff and said other persons produced, this plaintiff and persons in plaintiff's class will be damaged and injured in the amounts and manner herein alleged and the said plaintiff and persons in plaintiff's class will be injured, damaged and suffer great and irreparable harm and damage not only through the deprivation of said constitutional rights of said plaintiff and persons in plaintiff's class, by the said Act and Acts herein complained of, but the said plaintiff and persons in plaintiff's class will suffer said loss and irreparable harm through the said violation of the said constitutional rights, privileges and immunities of said wholesalers, distributors and customers who are and have been and will purchase the said beer of the said plaintiff and persons in plaintiff's class.

[fol. 47]

IV.

Clause Eleven of said Bill is further amended by adding thereto a paragraph to be designated as paragraph "H", which paragraph is, as follows:

"H. In the ten states designated by the said State Liquor Control Commission in their said regulation of December 14, 1937, the number of licensed breweries and the amount of beer by them produced during the fiscal year ending June 30, 1937 are now set out in the following table, to wit:

State	Number of Breweries	Barrels
Indiana	17	2,254,490
Maryland	12	1,338,893
Nevada	2	21,388
New Hampshire	1	58,824
North Carolina	1	82,293
Pennsylvania	109	6,614,907
Tennessee	3	155,952
Washington	17	915,391
Vermont	0	0

That in the fiscal year ending June 30, 1937, beer was produced in respective states named below by the number of breweries and in the amounts now set out:

State	Number of Breweries	Barrels
Illinois	62	4,059,423
Kentucky	7	986,039
Missouri	20	3,442,809
New York	69	9,230,725
Ohio	55	4,281,448
Wisconsin	86	6,448,420

That during the first nine calendar months in the calendar year 1937 there were in all 603,241 barrels of beer produced outside of and imported into the State of Michigan. During the first ten calendar months in the calendar year 1937 there were imported into the State of Michigan 145,250 barrels of beer produced in the State of Indiana. That substantially all of said 603,241 barrels of said beer imported into the State of Michigan during the said nine [fol. 48] months excepting the portion imported from the State of Indiana, were produced and shipped from the states of Illinois, Missouri, Ohio and Wisconsin and substantially no part of said beer produced outside of the State of Michigan and imported into the State of Michigan for sale therein during the said period of nine months was produced or shipped from the states of Maryland, Nevada, New Hampshire, North Carolina, Pennsylvania, Tennessee and Washington and none whatsoever from the State of Vermont. And that during the same period the amount of beer imported into the State of Michigan which was produced in other states of the Union than Michigan amounted to about twenty per cent. of the total amount of beer consumed in the State of Michigan. That in the four states of Illinois, Missouri, Ohio and Wisconsin, which, as above alleged, produced and imported into the State of Michigan in excess of two-thirds of the total amount of beer imported into the State of Michigan during said period, are located the number of breweries as above set out which are capable of producing and importing into the State of Michigan far more beer in addition to that already being imported into the State of Michigan therefrom than was produced in the State of Indiana and shipped into the State of Michigan.

That in the said regulation adopted by said Liquor Control Commission of the State of Michigan on December 14, 1937, the states of Illinois, Missouri, Ohio and Wisconsin are not designated as states having laws containing the provisions which require under said legislation of the State of Michigan the exclusion of beer produced therein.

That in fact the laws of the states which are not designated in the said regulation of the Liquor Control Commission of the State of Michigan do not contain provisions requiring the exclusion of beer produced therein under the said legislation of the State of Michigan.

That in truth and fact the type of liquor control statute described in said amended Section 40 herein complained of has no bearing or relation to the amount of beer produced in any of the said states and shipped into the State of Michigan and the fact whether or not laws of any of said [fol. 49] states contain provisions which require or do not require the exclusion of beer produced therein under said Section 40 has no bearing upon or relation to the amount of beer produced therein and shipped into the State of Michigan and the said standards prescribed in said statute of the State of Michigan for the admission or exclusion of beer produced in other states according to the provisions of the laws of other states have no bearing or relation in fact to the amount of beer made in any state and shipped therefrom into the State of Michigan or any bearing or relation to the control of liquor traffic in the State of Michigan."

V

The Supplemental Bill of Complaint hereto filed by plaintiff in this cause is hereby amended so that the incorporation by reference therein of certain provisions of the Bill of Complaint shall relate to the provisions of this Bill of Complaint as amended. In particular Clause One of said Supplemental Bill is hereby amended by inserting in line four after "complaint" the words "as amended".

H. W. Wienner, Attorney for Plaintiff, Business address: 1177 Penobscot Bldg., Detroit, Michigan. McHale, Arthur & Myers, 1012 Chamber of Commerce Bldg., Indianapolis, Indiana and Herbert J. Patrick, 1014 Chamber of Commerce Bldg., Indianapolis, Indiana, and Thomas F. O'Mara, Suite 315, Opera House Block, Terre Haute, Indiana, of Counsel.

[fols. 50-66] *Duly sworn to by Carl Frey. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 67] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED MOTION TO DISMISS—Filed January 17, 1938

To the Honorable Judges of the District Court of the United States for the Eastern District of Michigan, Southern Division:

Come now the above named defendants, and each of them, and amend their Motion to Dismiss heretofore filed, and as further grounds and reasons for their Motion to Dismiss the Bill of Complaint, the Supplemental Bill of Complaint and the Amendments to the Bill of Complaint and Supplemental Bill of Complaint heretofore filed, state:

1. That said Bill of Complaint, Supplemental Bill of Complaint and the Amendments thereto fail to show that the plaintiff is entitled to the relief therein demanded or to any relief whatsoever, in that:

(a) Section 40 of Act No. 8 of Public Acts of the State of Michigan of 1937, as amended, was enacted by the Legislature of the State of Michigan pursuant to the authority [fol. 68] and within the limits of the Twenty-first Amendment to the Constitution of the United States of America;

(b) That there is in force in the State of Indiana laws, rules and regulations which discriminate against beer manufactured within the State of Michigan in manner prohibited by said Section 40, in that the laws, rules and regulations in force in the State of Indiana require a licensed wholesaler of beer within the State of Indiana, who has paid a license fee of One Thousand Dollars ($1,000.00) for such privilege, to secure an additional license called a "port of entry" permit, for which a further fee of Fifteen Hundred Dollars ($1500.00) is required to be paid for the privilege of importing into and selling within the State of Indiana beer manufactured in the State of Michigan;

(c) That said laws, rules and regulations now existing within the State of Indiana are further discriminatory in that they deny the issuance of such license authorizing the importation of beer manufactured within the State of Michigan to any duly licensed wholesaler of beer within the State of Indiana who may make application for such license, but, on the contrary, limit the issuance of such additional "port of entry" permits to not more than one hundred (100) thereby limiting the number of licensees who may purchase and import beer manufactured within the State of Michigan;

(d) That by reason of the existence of such laws and regulations within the State of Indiana, said State has been properly designated by the Liquor Control Commission of [fol. 69] the State of Michigan as one in which discriminatory laws, rules and regulations exist.

2. That said Section 40 of the Michigan Liquor Control Act does not violate Section 8 of Article I of the Constitution of the United States for the reason that the Twenty-first Amendment to said Constitution abrogated the right to import free so far as intoxicating liquors were concerned.

3. That said Section 40 of the Liquor Control Act does not violate Section 10 of Article I of the Constitution of the United States for the reason that the prohibitions of said Section are only applicable to licensees purchasing, receiving, possessing or selling beer manufactured in any State designated by the Liquor Commission in a regulation, which State has been found to discriminate against beer manufactured within the State of Michigan, and that the revocation of the license of any person violating such regulation would not amount to an impairment of an obligation of a contract for the reason that a license to deal in intoxicating liquor is but a mere personal privilege granted by the Legislature of a State and is subject to the terms and conditions imposed at the time of its issuance, and such license is not a contract within the terms and meaning of Section 10 of Article I of the Constitution of the United States.

4. That said Section 40 of the Michigan Liquor Control Act does not violate Section 2 of Article 4 of the Constitution of the United States for the reason that the plaintiff is a corporation, organized and existing under the laws of [fol. 70] the State of Indiana, and is not a citizen entitled

to claim the benefits of the Privileges and Immunities Clause.

5. That said Section 40 of the Michigan Liquor Control Act does not violate the Fourteenth Amendment to the Constitution of the United States for the following reasons:

(a) The plaintiff corporation is not a citizen of the United States whose privileges or immunities are abridged by said Act;

(b) The plaintiff corporation is not a person within the jurisdiction of the State of Michigan which is denied the equal protection of the laws for the reason that the Bill of Complaint shows that said plaintiff corporation is organized and existing under the laws of the State of Indiana; said Bill of Complaint fails to allege facts which would amount to "doing business" by said corporation within the State of Michigan or which would subject it to the service of process therein. Said Bill of Complaint further fails to show that it has complied with the requirements of Statute of the State of Michigan which are prerequisite to its right to do business therein as a foreign corporation or which would subject it to or bring it within the jurisdiction of the State of Michigan.

(c) That said Section 40 of the Michigan Liquor Control Act does not violate the Fourteenth Amendment or the Equal Protection of the law's provision thereof, in that the Twenty-first Amendment recognizes and permits a State to classify intoxicating liquor which is manufactured outside thereof in a manner other and different than the *than* [fols. 71-80] *the* same kind of intoxicating liquors which are manufactured within said State, and such classification recognized by the Twenty-first Amendment is not forbidden by the Fourteenth.

6. That said Michigan Liquor Control Act and, particularly, Section 40 thereof, is not unconstitutional because of an unwarranted delegation of legislative power for the reason that said Section clearly defines and prescribes the conditions and circumstances under which said Section is made operative and nothing remains to be done by the Liquor Control Commission except to determine the fact

as to whether the legislation or the rules or regulations of another State conform to the terms and conditions prescribed in said Section 40.

Raymond W. Starr, Attorney General; George H. Heideman, Assistant Attorney General, Attorneys for the above named Defendants.

[File endorsement omitted.]

[fol. 81] In United States District Court for the Eastern District of Michigan, Southern Division

In Equity. No. 8269

Indianapolis Brewing Company, Inc., an Indiana Corporation, Plaintiff,

v.

The Liquor Control Commission of the State of Michigan et al., Defendants

Before Simons, Circuit Judge, and Moinet and O'Brien, District Judges

Opinion—Filed February 3, 1938

Simons, Circuit Judge:

The plaintiff is a brewing corporation of the State of Indiana, and brings this suit by bill in equity against the members of the Michigan Liquor Control Commission, the Governor and Secretary of State as ex-officio members of the Commission, and the State's Attorney General, to restrain by temporary and permanent injunction the enforcement of certain provisions of the State Liquor Law on the ground that they are violative of both Federal and State Constitutions. In conformity with law, a three judge court was specially convened to consider the petition for interlocutory injunction. No answer having been filed—the defendants moving to dismiss—we find the facts, so far as necessary to decision, as alleged in the bill and its accompanying affidavits.

The plaintiff is engaged in the manufacture of beer in Indiana and its sale in interstate commerce. The defendants are residents and citizens of Michigan and public officers of that state charged with the duty of enforcing its liquor laws and proposing to do so. The plaintiff is a licensee of the Michigan Liquor Control Commission, qualified as an out-of-State manufacturer to ship beer into Michigan, and has built up a valuable business and good will for its product in that State. In July, 1937, the Michigan Legislature amended Section 40, of Act. No. 8, of the Public Acts of the Extra Session of 1933 to provide that after its effective date the Liquor Control Commission should forthwith adopt a regulation designating the states, the laws, rules or regulations of which: (1) are found to require a [fol. 82] licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in Michigan; or (2) which deny the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license; or (3) which prohibit licensed wholesalers of beer therein from possession or selling beer purchased in Michigan, unless the one from whom it is purchased has secured a license and paid a fee therein, when such seller neither transports the beer into said state nor sells the same therein; or (4) impose any higher taxes or inspection fees upon beer manufactured in Michigan when transported into or sold therein than is imposed upon beer manufactured and sold within said state, and that the regulation so adopted shall prohibit all licensees from purchasing, receiving, possessing or selling, any beer manufactured in any state therein designated, such regulation to become effective ninety days after its adoption.

Pursuant to the authority and direction of amended Section 40, the defendant Liquor Control Commission on the 14th day of December, 1937, adopted a regulation as therein provided designating specific states, including Indiana, as discriminatory, and as a result the purchasing, receiving, possessing or selling of any beer manufactured in Indiana will become unlawful after the 14th day of March, 1938. The enforcement of this regulation will injure or destroy the business which the plaintiff has developed in Michigan. The discriminations against Michigan beer by the State of Indiana which led to the proscription of beer from that state by the regulation, are to be found in Sections 8, 9 and 41 of the Indiana Liquor Control Act of 1935. They require that licensed Indiana wholesalers in order to secure an import privilege pay an additional fee of $1500.00, and limit such permits to not more than 100. They require an additional bond for handling out-of-state beer of $10,000, and limit importation to beer which is the absolute property of the permittee.

While the bill assails validity in respect to numerous provisions of the Federal and State Constitutions, the issue, upon consideration of the decision in State Board of Equalization v. Youngs Market Co., et al., 299 U. S. 51, followed and applied by a local three judge court in Zukaitis, et. al., v. Fitzgerald, et al., 18 Fed. Supp. 1000, has now been nar- [fol. 83] rowed in argument and briefs to a consideration of the assailed statute in respect to invalidity under the "Equal Protection Clause" of the Fourteenth Amendment. This is the plaintiff's main reliance.

Conceding that under the Young's Market case a state may in the exercise of its police power, now freed by the Twenty-first Amendment from the restraint of the commerce clause, discriminate against out-of-state beer, or against persons importing or dealing in such beer, and likewise conceding under compulsion of that decision that a classification which distinguishes in treatment as between local beer and out-state beer does not offend the equal protection clause, the plaintiff urges that a classification which differentiates the product of certain states from that of other states is wholly arbitrary and capricious, and void under the equal protection clause. There exists no reasonable basis, it says, for this difference of treatment, and the regulation has no relation to the exercise of the police power of the state in protecting the health, safety, morals and welfare of its people. Nor does it aid in policing the state's regulatory laws governing the manufacture and sale of beer. Its purpose, it contends, is purely retaliatory and economic, for Michigan has no concern with the laws of other States and no power to impose its will by economic restrictions or prohibitions upon the law making power of other states. Nor has it the power to enact statutes or adopt regulations the enforcement of which may be subject to the exercise of legislative power in another state.

We have carefully examined the contentions thus stated. That the scope of state police power, except as it may have been restricted by constitutional grant of power to the Federal Government, is not limited by narrow connotations to be assigned to the historic phrase "the protection of the health, safety and morals of the people", would seem to be fairly clear upon consideration of many decisions. L. S. and M. S. Railroad Co. v. Ohio, 173 U. S. 285; C. B. & Q. Railroad Co. v. Drainage Commission, 200 U. S. 561, 592; Mutual Loan Co. v. Martell, 222 U. S. 225; Barbier v. Connelly, 113 U. S. 27; Cox v. Texas, 202 U. S. 446. Were there still doubt of the extent of such power as is sought to be exercised in the presently considered enactment it would, we think be resolved by the recent decision of the Supreme Court in the Louisiana Chain Store case (Great Atlantic & Pacific Tea [fol. 84] Co. v. Grosjean, 301 U. S. 412), wherein it was thought to reach to the promotion of "fair competitive conditions and to the equalization of economic advantages", and where it was also thought not limited by the fact that "the evils requiring regulation arise solely from operations * * * in part the result of extrastate transactions".

It is true, of course, that arbitrary discriminations and classifications without reasonable basis, are repugnant to a system of constitutional limitations, and may offend against the letter of the equal protection clause. But courts will not lightly assume legislative arbitrariness and caprice, and will not "declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators". So, "A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it * * *". Metropolitan Co. v. Brownell, 294 U. S. 580.

That the discrimination of the statute here assailed and the regulation adopted in pursuance thereof are not directed specifically against the industries of Indiana or their customers in Michigan is clear, for nine other states are in the same classification, and it operates equally upon all. Let it be conceded that a classification, even though general in terms, may still be unreasonable and arbitrary, such is not the case here. The long history of efforts by state and national governments to control and regulate the manufacture and sale of alcoholic beverages, culminating in the adoption of the prohibitory Eighteenth Amendment and its repeal by the Twenty-first Amendment, with the qualification incorporated therein, demonstrates beyond peradventure that the manufacture and sale of alcoholic liquors are peculiarly subject to abuse, and that the public interest requires their most careful supervision. To that end states generally limit the number of persons who may engage therein, require licenses and bonds, and inquire into the character, reputation, and financial ability of permittees. Where the industry is legalized there is a vital state interest in the economic stability of those who are permitted to engage in it, to the end that the usually high taxes and license fees may be promptly paid and that difficult competitive conditions may not tempt them to sharp practice and law evasion. [fol. 85] Strict numerical limitation upon manufacturers, wholesalers, and retailers, is sufficiently demonstrative. Michigan finding the markets of other states closed to its own industry while its own market is open to unlimited competition, is free to seek legislative correction of an unequal competitive condition within the limits of its power. It may not, of course, exercise extra-territorial power or control the legislatures of its sister states, but it is idle to deny it power to regulate its own industry and control its own market to the extent that its industries are elsewhere excluded, and to the extent that such exclusion threatens their economic stability, and it is not an unreasonable classification to discriminate against out-state products in respect to their source when the laws of the state of origin create the evil sought to be remedied and the classification operates equally upon all who fall within its reach.

It is not sound challenge to this power to say that the Michigan Act will not effectuate the legislative purpose since the closing of its doors to beer of ten states will only bring a greater flow of beer into Michigan from the larger producing states of which Indiana is not one. The contention is based on speculation, but even if rested upon fact it is still tenuous, for "the Legislature is not required to make meticulous adjustments in an effort to avoid incidental hardships. It is enough that the classification has reasonable relation to the differences * * *." Atlantic & Pacific Tea Co. v. Grosjean, Supra, 424. Power is not to be denied merely because it might have been more wisely or more effectually exercised.

The plaintiff relies very largely for support to its assault upon the reasonableness of the classification upon the decision of a three-judge court in Minnesota in the case of Joseph Triner Corp. v. Mahoney, State Control Commissioner, 11 Fed. Supp. 145, decided originally before the announcement of the decision in the Young's Market case but thereafter to the same effect under the style Triner Corp. v. Arundel, 20 Fed. Supp. 1019. It is sufficient to say that the Triner case involved a classification wholly dissimilar to that here considered, that the Minnesota court found no reasonable basis for it, while for that here involved we do.

Notwithstanding an early concession that the validity of the regulation adopted by the Commission is not involved in this action except insofar as dependent upon the validity of the law authorizing it, the plaintiff makes belated effort [fols. 86-87] to comonstrate that the Indiana Liquor Law does not substantially discriminate against out-state beer. We are not confronted, however, with choice of accepting one of two inconsistent positions, for neither the bill nor the amended bill allege infirmity in the regulation if the law be valid. Had such issue been raised it might have been met by the defense of adequate legal remedy under the provision contained in Section 40 that "Any licensee or person adversely affected shall be entitled to review by certiorari to the proper court the question as to whether the Commission had acted illegally or *in excess of authority in making its finding with respect to any state.*" The question not being here, we do not, of course, decide it.

Our conclusion is that the assailed Michigan statute is constitutionally valid. There being no other ground upon which it is sought, the prayer for interlocutory injunction is denied. It appearing also that a hearing upon the merits will add nothing to applicable or presently conceded facts, that relief, both temporary and permanent, is grounded solely upon asserted invalidity of the statute, and the case, unlike Borden's Co. v. Baldwin, 293 U. S. 194, not being one where evidence is reasonably likely to make answer to that question clearer.

The bill is dismissed, with costs to the defendants.

Charles C. Simons, Circuit Judge. Edward J. Moinet, District Judge. Ernest A. O'Brien, District Judge. c/o C. C. S.

February 3, 1938.

[File endorsement omitted.]

[fol. 88] IN UNITED STATES DISTRICT COURT

[Title omitted.]

PLAINTIFF'S PROPOSED SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER EQUITY RULE 70½—Filed February 23, 1938.

The matter of the application of plaintiff's herein for an interlocutory injunction having come on regularly for hearing on the — day of December, 1937, at the hour of 1:30 o'clock P. M. in the Court room of the Honorable Edward J. Moinet on the 7th Floor of the Federal Building, in the City of Detroit, Michigan, before the Honorable Charles C. Simons, Judge of the United States Circuit Court of Appeals for the Sixth Circuit, the Honorable Edward J. Moinet, Judge of the District Court of the United States for the Eastern District of Michigan, Southern Division, and the Honorable Ernest A. O'Brien, Judge of the District Court of the United States for the Eastern District of Michigan, Southern Division, organized and sitting as a three-judge Court under and by virtue of the provisions of Section 266 as amended, of the Judicial Code of the United States, (Section 380 of the United States Code Annotated), for the hear- [fol. 89] ing and determination of this cause, plaintiff being represented and appearing by Harris W. Wienner, Thomas F. O'Mara and Herbert J. Patrick, of its counsel, and defendants, the Liquor Control Commission of the State of Michigan, Edward W. McFarland, Hale G. Knight, Verold F. Gormely, individually and as members of the Liquor Control Commission of the State of Michigan, Frank Murphy, and Leon D. Case, individually and as members ex officio of the Liquor Control Commission of the State of Michigan, and Raymond W. Starr, individually and as Attorney General of the State of Michigan, being represented and appearing by their counsel, —— Heidemann, Deputy Attorney General of the State of Michigan and counsel for the Liquor Control Commission of the State of Michigan, and the motion of said defendants for a dismissal of plaintiff's bill of complaint having also come on for hearing at said time and place and having been heard, and the Court having heard all of the evidence introduced at such hearing and the argument of counsel and being duly advised in the premises and having announced its decision in favor of the defendants and against the plaintiff, now makes its findings of fact and conclusion of law pursuant to the provisions of Equity Rule 70½ as follows:

1. The plaintiff, Indianapolis Brewing Company, In., is a corporation organized under the laws of the State of Indiana, with its principal office for the transaction of business in the City of Indianapolis, County of Marion, in said State, and is a citizen and resident of said State, and is not a citizen or resident of the State of Michigan.

2. The defendant, The Liquor Control Commission of the State of Michigan, is the duly organized and existing authority created by Act No. 8, of the Public Acts of the Extra Session of 1933 of the State of Michigan, as amended by Act No. 241 of the Public Acts of 1935, and Act No. 281 of the Public Acts of 1937 of said State, and by said laws and stat- [fol. 90] utes is vested with the sole right, power and duty to control the alcoholic beverage traffic within the State of Michigan, and is charged with the enforcement and administration of said laws and statutes and is a citizen and resident of the City of Lansing, County of Ingham, State of Michigan, and is a citizen and resident of the Eastern District of Michigan, Southern Division thereof.

The defendants, Edward W. McFarland, Hale G. Knight and Verold F. Gormely, are members of the Liquor Control Commission and all citizens and residents of the State of Michigan and of the Eastern District of Michigan, Southern Division.

The defendant, Frank Murphy, is the duly elected, qualified and acting Governor of the State of Michigan, and as such is a member ex officio of the Liquor Control Commission of the State of Michigan and is a citizen and resident of the State of Michigan.

The defendant, Leon D. Case is the duly elected, qualified and acting Secretary of State of the State of Michigan, and as such is a member ex officio of the Liquor Control Commission of the State of Michigan and is a citizen and resident of the State of Michigan.

The defendant, Raymond W. Starr, is the duly elected, qualified and acting Attorney General of the State of Michigan and is a citizen and resident of the State of Michigan.

3. That the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand ($3,000.00) Dollars.

4. That this is an action in equity brought pursuant to the provisions of Section 266 as amended, of the Judicial Code of the United States (Section 380, United States Code Annotated) for the purpose of obtaining a temporary restraining order, an interlocutory injunction and a permanent injunction against the said defendants and each of them to restrain and enjoin them from enforcing the provisions of Section 40, Act No. 281, as amended, of the Public Acts of the State of Michigan and the enforcement of a certain [fol. 91] regulation adopted by the Liquor Control Commission of the State of Michigan on the 14th day of December, 1937, pursuant to said Section 40, upon the ground that Section 40 violates the provisions of the Constitution of the United States.

5. The plaintiff is engaged in the manufacture of beer in Indiana and of its sale in interstate commerce and is a licensee of the Michigan Liquor Control Commission, qualified as an out of state manufacturer to ship beer into Michigan, and has built up a valuable business and good will for its product in the State of Michigan.

6. The defendants and each of them are public officers of the State of Michigan charged with the duty of enforcing the liquor laws of such state.

7. The Legislature of the State of Michigan in July, 1937, amended Section 40 of Act No. 8 of the Public Acts of the Extra Session of 1933 to provide that after its effective date the Liquor Control Commission of said State should forthwith adopt a regulation designating the states, the laws, rules or regulations of which, (1) are found to require a licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in Michigan, or (2) which deny the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license, or (3) which prohibit licensed wholesalers of beer therein from possessing or selling beer purchased in Michigan, unless the one from whom it is purchased has secured a licensed and paid a fee therein, when such seller neither transports the beer into said state nor sells the same therein or (4) impose any higher taxes or inspection fees upon beer manufactured in Michigan when transported into or sold therein than is imposed upon beer manufactured and sold within said state; and that the regu-

lation, when so adopted, shall prohibit all licensees in the State of Michigan from purchasing, receiving, possessing or selling any beer manufactured in any state therein desig- [fol. 92] nated, such regulation to become effective ninety days after its adoption.

8. That pursuant to the authority and direction of said amended Section 40, the defendant Liquor Control Commission of the State of Michigan, on the 14th day of December, 1937, adopted a regulation as therein provided, designating specific states, ten in number, and including the State of Indiana, as discriminatory under the provisions of said Section 40, and as a result of the adoption of such regulation, the purchasing, receiving, possessing or selling of any beer manufactured in Indiana will become unlawful in the State of Michigan after the 14th day of March, 1938.

9. That the provisions of the laws of Indiana which bring such state within the classifications of said Amended Section 40 are found in Sections 8, 9 and 41 of the Alcoholic Beverage Act of 1935 of the State of Indiana, which provide that licensed Indiana wholesalers, in order to secure the privilege of importing beer into the State of Indiana from points outside of such state and of selling the same in all of the counties of the State of Indiana, are required to pay for such privilege an additional fee of Fifteen Hundred ($1500.00) Dollars and to file with the proper state authorities an additional bond in the sum of Ten Thousand ($10,000.00) Dollars, and that the number of such permits so to be issued in said State of Indiana shall be not more than one hundred (100) in number and that no beer shall be imported pursuant to any such permit which is not the absolute property of the permittee importing the same.

10. That as a result of the adoption of this regulation by the Liquor Control Commission on the 14th day of December, 1937, the valuable business and good will which this plaintiff has built up for its product in the State of Michigan is being greatly and increasingly injured and will be after the 14th day of March, 1938 entirely destroyed, and that the value of such business is in excess of Ten Thousand ($10,000.00) Dollars.

[fol. 93] 11. That in the conduct of its business plaintiff has during the past several years sold large quantities of its products to duly licensed wholesalers and distributors in the State of Michigan and that the approximate value of plaintiff's products so sold in said state for the years 1935, 1936 and the first ten months of the year 1937 have totaled the sum of $127,489.35.

12. That there are in the State of Indiana numerous other manufacturers of beer who are in a situation similar to that of plaintiff and that the plaintiff brings this action on behalf of itself and of such others so similarly situated and that if the relief prayed for in plaintiff's bill of complaint is granted, the same will prevent a multiplicity of suits and prosec*tu*ions which would otherwise arise in connection with the enforcement of said act.

That the defendants, and each of them, unless restrained and enjoined by this Court from so doing will enforce against the plaintiff herein and its customers and against such others similarly situated the provisions of said Section 40 hereinbefore referred to and will, after the 14th day of March, 1938, take such steps by way of prosecution and otherwise under the provisions of said Liquor Control Act of the State of Michigan as may be necessary to prevent any and all licensees in the State of Michigan from purchasing, receiving, possessing or selling any beer manufactured in the State of Indiana.

13. That the ten states of the United States declared to be discriminatory by said regulation of December 14, 1937, above referred to, are the states of Indiana, Maine, Maryland, Nevada, New Hampshire, North Carolina, Pennsylvania, Tennessee, Washington and Vermont, That the remaining states of the Union, and including Illinois, Kentucky, Mississippi, New York, Ohio, and Wisconsin, have not been declared to be discriminatory within the provisions of said Section 40 and that said Liquor Control Commission of the State of Michigan does not have any intent so to designate them, and that as a result thereof, the manufacturers of such states which have not been declared to be [fol. 94] discriminatory, will be free to continue to import and sell within the State of Michigan the alcoholic malt beverages and beer manufactured by them.

14. That during the first nine calendar months in the calendar year of 1937 there were in all 603,241 barrels of beer produced outside of and imported *and* into the State of Michigan and that during the first ten calendar months of said calendar year of 1937 there were imported into the

State of Michigan 145,250 barrels of beer produced in the State of Indiana. That substantially all of said 603,241 barrels of beer imported into the State of Michigan during the said nine months above referred to, except the portion imported from the State of Indiana, were produced in, and shipped from, the States of Illinois, Missouri, Ohio and Wisconsin, which have not been designated as discriminatory states and that substantially no part of said beer produced outside of the State of Michigan and imported into the State of Michigan for sale therein during the said period of nine months was produced in, or shipped from the States of Maine, Maryland, Nevada, New Hampshire, North Carolina, Pennsylvania, Tennessee and Washington, which were designated as discriminatory states by said regulation of December 14, 1937, and none whatsoever from the State of Vermont, which was so designated as a discriminatory state in said regulation of December 14, 1937.

15. That the allegations of the bill of complaint as amended and the supplemental bill of complaint as amended, together with the exhibits thereto and the facts as contained in the affidavits of Carl A. Frey and of Harold Feightner, introduced as evidence at the hearing so far as the same may be necessary to the decision of the questions before the Court, are true.

[fol. 95] Upon the foregoing findings of fact the Court now makes and enters its conclusions of law as follows:

Conclusions of Law

1. That there exists in this suit the requisite amount in controversy and the diversity of citizenship to give jurisdiction; that the questions herein arise under the Constitution of the United States; that this Court has jurisdiction hereof, and that the jurisdiction of this Court in Equity is properly invoked.

2. That Section 40 of Act No. 281 of the Public Acts of the State of Michigan for the year 1937 is constitutionally valid and does not violate the Constitution of the United States or any provision thereof.

3. That the equity is with the defendants.

4. That the interlocutory injunction should be denied.

5. That a hearing upon the merits of the case will add nothing to the applicable facts and that this cause should be dismissed.

It is, Therefore, Considered, Ordered, Adjudged and Decreed by the Court that the plaintiff be denied an interlocutory injunction against the said defendants and each of them and that this cause be finally dismissed and that the defendants and each of them recover their costs of and from the plaintiff.

It is Further Ordered that the plaintiff have its exceptions to the order of the Court denying such interlocutory injunction and to said order of final dismissal.

Dated at Detroit, Michigan this — day of February, 1938.

——— ———, United States Circuit Judge, ——— ———, United States District Judge, ——— ———, United States District Judge.

[File endorsement omitted.]

[fol. 96] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED 'SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER EQUITY RULE 70½'—Filed February 28, 1938

The defendants herein, by Raymond W. Starr, Attorney General, Edmund E. Shepherd, and Andrew DeMaggio, assistants attorney general, interpose the following objections to plaintiff's proposed 'Special Findings of Fact and Conclusions of Law under Equity Rule 70½,' and offer a proposed substitute order:

1. Equity Rule 70½ provides:

"In deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts specially and state separately its con- [fol. 97] clusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rules 75 and 76."

Obviously, this rule applies to those causes in which issues of fact are involved, and conflicting testimony taken.

It does not seem to apply to issues of law raised by motion to dismiss in the nature of demurrer.

2. The facts set forth in plaintiff's bill of complaint, as amended and supplemented, are admitted to be true for the purpose of passing upon defendants' motion to dismiss, while the court's opinion concisely states the facts, and its conclusions of law thereon, with sufficient clarity to present all questions on appeal.

While in one case, L. & N. R. Co. v. United States, 10 Fed. Supp. 185, to the effect that the rule is imperative, and applies to a suit where no evidence is offered by either side, it has been held on several occasions that the opinion of the court, when clear and concise, may stand as the findings of fact and conclusions of law required by Equity Rule 70½. Briggs v. United States, 45 F (2d) 479; Lewys v. O'Neil, 49 F (2d) 603; American Can Co. v. M. J. B. Co., 52 F (2d) 904; Parker v. St. Sure, 53 F (2d) 706; Bradt v. Kelsey-Hayes Wheel Corp., (D. C. Mich.), 14 Fed. Supp. 709; Moesta v. Briggs Mfg. Co., (D. C. Mich.), 16 Fed. Supp. 596.

3. By its recitals, plaintiff's proposed findings of fact under Equity Rule 70½ would lead an appellate court to [fol. 98] believe that issues of fact involved in this suit had been determined upon consideration of 'evidence introduced' at the hearing.

4. No evidence was introduced upon the hearing of this cause; no questions of fact were presented, and plaintiff's proposed 'findings of facts' leads to false impressions in that regard.

5. The defendants' proposed substitute order denying interlocutory injunction and dismissing the bill of complaint, as supplemented and amended, refers to this court's decision and opinion, and by reference, incorporates it therein.

Raymond W. Starr, Attorney General. Edmund E. Shepherd, Andrew DeMaggio, Assistants Attorney General.

[File endorsement omitted.]

[fol. 99] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

In Equity. No. 8269

INDIANAPOLIS BREWING COMPANY, INC., an Indiana Corporation, Plaintiff,

vs.

THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN Edward W. McFarland, Hale G. Knight, and Verold F. Gormely, Individually and as Members of the Liquor Control Commission of the State of Michigan; Frank Murphy and Leon D. Case, Individually and as Members Ex-officio of the Liquor Control Commission of the State of Michigan, Raymond W. Starr, Individually and as Attorney General of the State of Michigan, Defendants.

ORDER DENYING INTERLOCUTORY INJUNCTION, AND DISMISSING BILL OF COMPLAINT, AS SUPPLEMENTED AND AMENDED

At a session of said court held at the City of Detroit, Eastern District of Michigan, Southern Division, on the 5th day of March, A. D. 1938, before the Honorable Charles C. Simons, Circuit Judge, and the Honorable Edward J. Moinet, District Judge, and the Honorable Ernest A. O'Brien, District Judge, presiding in this cause pursuant to Section 266 of the Judicial Code, as amended (Title 28 U. S. C. A., § 380).

This cause having come on to be heard upon plaintiff's petition for an interlocutory injunction as prayed in its bill of complaint, as amended and supplemented, and upon de- [fol. 100] fendants' motion to dismiss said bill, and the court having heard the arguments given and the authorities submitted by the attorneys for the respective parties; and the said judges having made and filed their decision that said interlocutory injunction should be denied, and that the bill should be dismissed upon the several grounds set forth in said decision;

Now, therefore, it is hereby ordered that said interlocutory injunction be denied, and that said bill of complaint, as amended and supplemented, be and is hereby dismissed, with costs to the defendants, for the reason that the Michigan statute assailed in said bill (Section 40, Act No. 8, Public Acts 1933, Extra Session, as amended by Act No. 281, Public Acts 1937) is constitutionally valid as against the objections raised, there being no other ground upon which relief is sought.

It is further ordered that the decision and opinion of said judges shall be considered as incorporated in this order.

Edward J. Moinet, Judge.

Raymond W. Starr, Attorney General, Edmund E. Shepherd, Andrew DeMaggio, Assistant Attorney General, Attorneys for Defendants.

[fol. 101] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING MOTION FOR SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause is now before the court upon a petition requesting special findings of fact and conclusions of law, and it appearing that there are no issues of fact presented since no answer has been filed and no evidence received, and since in our opinion heretofore filed we have made the general finding that we accept the facts as stated in the bill of complaint and amendments and the affidavits attached thereto, and have made therein such detailed findings as bear upon the legal and constitutional issues, and since our conclusions of law are with sufficient particularity set forth in said opinion,

The petition for special findings of fact and conclusions of law is hereby denied.

(Signed) Charles C. Simons, United States Circuit Judge. (Signed) Edward J. Moinet, United States District Judge. (Signed) Ernest A. O'Brien, United States District Judge.

Detroit, Michigan, March 5th, 1938.

[fol. 102] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAINTIFF'S ASSIGNMENTS OF ERROR—Filed April 27, 1938

Indianapolis Brewing Company, Inc., plaintiff herein, comes now by counsel and, in connection with its petition for appeal, files the following assignments of error on which it will rely in its appeal to the Supreme Court of the United States from the final order or decree of the District Court, herein, dated and entered on the 5th day of March, 1938.

The Court erred:

1. In dismissing the bill of complaint.

2. In denying the interlocutory injunction applied for by plaintiff against the enforcement of amended Section 40 of Act No. 8 of the Public Acts of the Extra Session of 1933 of the State of Michigan and the regulation of the Liquor Con- [fol. 103] trol Commission of the State of Michigan adopted pursuant thereto on the 14th day of December, 1937, and each of them by the said defendants and each of them.

3. In holding and decreeing that the State of Michigan had power under the Second Section of the Twenty-First Amendment of the Constitution of the United States to enact Act Number 281 of the Public Acts of that State for the year 1937 amending Section 40 of Act Number 8 of the Public Acts of the Extra Session of 1933 of the State of Michigan, and under the authority thereof, to adopt the regulation of the Liquor Control Commission dated December 14, 1937.

4. In holding and decreeing that Act Number 281 of the Public Acts of Michigan for 1937 amending Section 40 of Act Number 8 of the Public Acts of the Extra Session of 1933 of that State, and the regulation of the Liquor Control Commission of the State of Michigan adopted December 14, 1937, under the authority thereof were each not repugnant to the Commerce Clause of the Constitution of the United States, namely, Section 8 of Article I thereof.

5. In holding and decreeing that said Act Number 281 amending said Section 40 and the regulation of the Liquor Control Commission of Michigan adopted December 14,

1937, pursuant thereto, did not each violate the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States.

6. In holding and decreeing that the appellant was not denied the equal protection of the laws contrary to the Fourteenth Amendment of the Constitution of the United States by reason of the enactment of said Section 40 amended as aforesaid, and of said regulation adopted pursuant thereto.

7. In holding and decreeing that the State of Michigan had the power under the Second Clause of the Twenty-First [fol. 104] Amendment of the Constitution of the United States, without violating the provisions of the Commerce Clause and the Equal Protection and Due Process Clauses of the Fourteenth Amendment of said Constitution, to enact Act Number 281 of the Public Acts of Michigan for 1937 amending Section 40 of Act Number 8 of the Public Acts of the Extra Session of the year 1933 and to adopt said regulation of said Liquor Control Commission.

8. The District Court erred in holding and decreeing that the Twenty-First Amendment to the Constitution of the United States dispenses with the application and operation of the Commerce Clause of the Constitution of the United States and the Fourteenth Amendment thereof in respect to said amended Section 40 notwithstanding that the sole object and purpose of said Section was to promote the sale of beer produced in Michigan throughout other States of the Union through economic retaliation.

Wherefore, the plaintiff prays that the order and decree of the District Court, as dated and entered on the 5th day of March, 1938, dismissing plaintiff's bill of complaint, as amended and supplemented, and denying plaintiff's prayer for an interlocutory injunction, be reversed and set aside, and that it be granted relief as prayed for in its said bill of complaint, as amended and supplemented.

Harris W. Wienner, Thomas F. O'Mara, Herbert J. Patrick, Attorneys and Solicitors for Plaintiff.

[File endorsement omitted.]

[fol. 105] IN UNITED STATES DISTRICT COURT

[Title omitted.]

PLAINTIFF'S PETITION FOR APPEAL—Filed April 27, 1938

To The Honorable Edward J. Moinet, Judge of the District Court of the United States for the Eastern District of Michigan, Southern Division:

The Indianapolis Brewing Company, Inc., an Indiana Corporation, your petitioner herein, prays that it be allowed to take an appeal to the Supreme Court of the United States from the order of said District Court consisting of three judges in pursuance of Section 266 of the Judicial Code of the United States as amended, (Title 28 U. S. C. A. Section 380), denying the prayer of said plaintiff for an interlocutory injunction as prayed in plaintiff's bill of complaint as amended and supplemented in said cause and also from the final order and decree of said Court dismissing plaintiff's said bill of complaint, as [fol. 106] amended and supplemented, which order and decree of said District Court were entered in said cause on the 5th day of March, 1938, and prays that said appeal be allowed to the said plaintiff for the reasons specified in plaintiff's assignment of errors which is filed herewith.

That plaintiff considers himself aggrieved by said order and said decree made and entered in this cause by said Court and does hereby appeal from each of said order and decree to the Supreme Court of the United States.

Wherefore, this plaintiff prays that he be allowed to appeal to the Supreme Court of the United States from said order and decree and for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated be sent to the Supreme Court of the United States.

Dated this 27th day of April, 1938.

Harris W. Wienner, Thomas F. O'Mara, Herbert J. Patrick, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 107] IN UNITED STATES DISTRICT COURT

[Title omitted.]

ORDER ALLOWING APPEAL

The appellant in the above entitled cause having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the decree made and entered in the above entitled cause by the District Court of the United States for the Eastern District of Michigan, Southern Division, on the 5th day of March, 1938, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided.

It is Now Here Ordered that an appeal be, and the same is, hereby allowed to the Supreme Court of the United [fol. 108] States from the District Court of the United States for the Eastern District of Michigan, Southern Division, in this cause, as provided by law, and it is further ordered that the Clerk of the said Court shall prepare and certify a transcript of the record, proceedings, and decree in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within Forty days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of $500.00.

Edward J. Moinet, District Judge in and for the District Court of the United States, Eastern District of Michigan.

Dated April 27th, 1938.

[fols. 109-139] Citation, in usual form, showing service on Raymond W. Starr, omitted in printing.

[fol. 140] IN UNITED STATES DISTRICT COURT

[Title omitted.]

Condensed Statement of Evidence

The evidence introduced and submitted to the Court in support of plaintiff's prayer for an interlocutory injunction at the time of the hearing of the application therefor on the 29th day of December, 1937, excepting the pertinent portions of the statutes of Michigan and of Indiana of which the Court took judicial notice and which are specially referred to in the pleadings, consisted of the following only:

1. The affidavit of Carl A. Frey, filed December 27, 1937;

2. The affidavit of Harold Feightner, filed December 27, 1937;

3. The plaintiff's bill of complaint, originally filed December 10, 1937 as amended and supplemented by the amendment thereto filed December 27, 1937 and the supplemental bill filed December 30, 1937.

[fol. 141] 4. The regulation of the Liquor Control Commission of the State of Michigan set out in Clause 3 of the plaintiff's supplemental bill of complaint as amended.

AFFIDAVIT OF CARL A. FREY

(1) In this affidavit Carl A. Frey deposed on oath and said: "That he is the Secretary and Treasurer and General Manager of Indianapolis Brewing Company, Inc., the plaintiff in the above entitled cause. That said Indianapolis Brewing Company, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana, having its principal office and place of business in the City of Indianapolis, County of Marion, State of Indiana, and is a citizen and resident of said State, and is not a citizen or resident of the State of Michigan. That the said defendants and each of them are residents of the State of Michigan and that the said defendants Edward W. McFarland, Hale G. Knight and Verold F. Gormely, Frank Murphy and Leon D. Case constitute and compose the Liquor Control Commission of the State of Michigan, hereinafter sometimes referred to as the "Commission", which said Commission, under and pursuant to the laws of the

State of Michigan, is vested with the sole right, power and duty to control the alcoholic beverage traffic and traffic in other alcoholic liquor within the State of Michigan, and is charged with the enforcement and administration of said laws and statutes.

That said Indianapolis Brewing Company, Inc., now is and has been continuously since the 1st day of January, 1935, duly authorized to conduct and has engaged in the business of the manufacture and sale of alcoholic malt beverages, and other lawful lines of business allied therewith in the State of Indiana, and now owns and operates, and since said last mentioned date has owned and operated, a plant in the State of Indiana wherein it manufactures and has continuously manufactured since said date, alcoholic malt beverages, which it has sold and is selling in many parts [fol. 142] of the United States where such sales are lawful, including the State of Michigan, in which said State its sales are and have been made at all times since said date to persons duly licensed by the above mentioned Liquor Control Commission in the State of Michigan. That prior to making any such sales to the various licensees authorized to purchase such alcoholic malt beverages from it in the State of Michigan, the said Indianapolis Brewing Company, Inc., procured from the Liquor Control Commission of the State of Michigan pursuant to and in accordance with the rules and regulations of said Commission a certain license or contract of license to sell beer and/or malt liquors to wholesale permittees licensed under and by said Commission, which said license or contract of license has been renewed by it from year to year and the last of which said renewals was issued on the 29th day of April, 1937, by said Liquor Control Commission of the State of Michigan and was Numbered 14, and by its terms authorized and empowered said Indianapolis Brewing Company, Inc., to sell beer and/or malt liquors to wholesale permittees of said Liquor Control Commission until the 1st day of May, 1938, unless cancelled, revoked or declared null and void by such Commission previous to such date. That a true and correct copy of said License Number 14 issued April 29, 1937, is attached to and made a part of this affidavit, marked Exhibit "A". That in connection with the issuance of said license of April 29, 1937, and such preceding licenses hereinbefore referred to, the said Indianapolis Brewing Company, Inc., paid to the Liquor Control Commission as an annual license fee for the same the sum of Five ($5.00) dollars in accordance with and pursuant to the regulations of said Commission. That since the 1st day of January, 1935, the said Indianapolis Brewing Company, Inc., has, pursuant to the right so granted to it by said Commission sold large quantities of its products to duly licensed wholesale permittees in the State of Michigan of the approximate value as follows:

[fol. 143] For the Year 1935	$44,654.85
For the Year 1936	44,838.91
For the first 10 months of the Year 1937	37,995.59
Total for Two Years and Ten Months	$127,489.35

That in making such sales to said wholesale permittees and licensees the said Indianapolis Brewing Company has at all times sold the same f.o.b. such permittees' place of business in the State of Michigan and has, in connection therewith, delivered the same by trucks owned by said plaintiff and operated by licensed truck drivers, except that such occasional shipments are made by common carrier, but that in each such case whether delivery is made by trucks of the plaintiff or by common carrier, the title to such alcoholic malt beverages passes to such permittee at the time of delivery at the place of business of such licensed permittee in the State of Michigan. Provided, further, That in the case of certain alcoholic malt beverages sold to West Shore Sales Corporation at Muskegon Heights, Michigan, a licensed wholesale permittee of said Commission in the State of Michigan, certain shipments of said alcoholic malt beverages have been, upon the order of said permittee, delivered direct to the warehouse of the Great Atlantic and Pacific Tea Company in Grand Rapids, Michigan, to an authorized representative of said West Shores Sales Corporation present at such warehouse at the time such deliveries are so made, at which time of deliveries the required revenue tax stamps of the State of Michigan are applied to the containers of such beverages.

That as a result of such sales so made by the plaintiff to said licensed wholesale permittees of the State of Michigan, there has been created in said State of Michigan a demand for the alcoholic malt beverages manufactured by the plaintiff and that as a result thereof, the value of the good will and business so created in the State of Michigan for the alcoholic malt beverages of said plaintiff are worth at the present time an amount greatly in excess of Ten Thousand ($10,000.00) Dollars, to-wit: Fifty Thousand Dollars. That [fol. 144] the said business and goodwill so created and now existing in the State of Michigan has been acquired and created by this plaintiff by reason of the fine quality of its products and by the expenditure of money in advertising, solicitation and through other lawful means and that as a result thereof, a valuable sales and distribution system for the said products of the plaintiff has been built up and now exists in the State of Michigan.

That since the 21st day of July, 1937, the said Commission has repeatedly threatened to designate the State of Indiana as a discriminating state under and in accordance with the provisions of Section 40 of Act Number 8 of the Public Acts of the Extra Session of 1933 of the State of Michigan, as amended by Act Number 281 of the Public Acts of 1937 of the State of Michigan, by issuing and causing to be issued statements to the effect that the said State of Indiana was and is a state of discrimination as described in said Section 40 as amended and that said Liquor Control Commission of the State of Michigan proposed to and would adopt and issue a regulation so designating the State of Indiana unless the said State of Indiana so amended its laws as to remove therefrom such provisions as brought it within the classification of discriminating states as set out and described in said Section 40. That as a result of said statements so made by the members of said Commission, defendants herein, the various licensed wholesale permittees purchasing the said products of this plaintiff and their customers became apprehensive and fearful in connection with further purchases of alcoholic malt beverages from said plaintiff and, by reason of such apprehension and fear, have seriously considered the necessity of making other connections and arrangements for the purchase and sale of alcoholic malt beverages to be imported from states other than the State of Indiana and from manufacturers other than this plaintiff. That following the making of said threats the said Commission did on the 14th day of December, 1937, adopt a regulation designat- [fol. 145] ing the State of Indiana as a State of discrimination pursuant to the provisions of said Section 40 as amended and, as a result thereof, unless restrained and enjoined from enforcing the provisions of said regulation, the importation, sale and possession of the alcoholic malt products of this plaintiff will become unlawful in the State of Michigan on and after the 14th day of March, 1938. That a true and complete copy of said regulation so adopted is attached hereto and made a part of this affidavit, marked Exhibit "B". That as a result of the adoption of said regulation, this plaintiff is now suffering in the loss of business and good will so produced and created by it as hereinbefore set out and will continue to increasingly suffer in the loss of such business and good will until the 14th day of March, 1938, at which time, by reason of said regulation, the further importation, sale and possession of its said alcoholic malt products will be entirely forbidden in the State of Michigan. That pending the final taking effect of said regulation on the 14th day of March, 1938, the said wholesale licensed permittees heretofore and now importing, selling and distributing the alcoholic malt beverages of this plaintiff, will continuously reduce the amount of their purchases and stock on hand of the said products of this plaintiff in order to be entirely free of any stock on hand by the said effective date of March 14, 1938 and, in like manner, the distributees and customers of said licensed wholesale permittees of this plaintiff will in like manner reduce their purchases and stock on hand of the alcoholic malt beverages produced by this plaintiff so as to be entirely clear of any such stock on hand on such effective date, as a result of which said plaintiff will entirely lose its said business, business connections and good will in the State of Michigan as a result of the adoption of said regulation of December 14, 1938, and will be damaged thereby in an amount far in excess of the sum of Twn Thousand ($10,000.00) Dollars, as hereinbefore set out, and being the actual value at the present time of the said business, and good will of said Indianapolis Brewing Company, Inc."

[fol. 146] (This affidavit was duly subscribed and sworn to before a competent Notary Public.)

AFFIDAVIT OF HAROLD FEIGHTNER

(2) In this affidavit Harold Feightner deposed on oath and said:

"That he is now and has been for about four years last past continuously Executive Secretary of The Indiana Brewers Association and in said position is his duty to familiarize himself with, compare, examine and compute statistics relating to breweries and their products within the State of Indiana and within other states of the Union, and in the course of the execution of his said duties he has from time to time read, examined, and compared statistics published by the Government of the United States, those reported in various reports of the officers of the different states in the course of their official duties and with statistics prepared and published in alcoholic trade journals commonly accepted and acted upon by persons engaged in the manufacture, sale and distribution of alcoholic malt products including beer, that he has from said experience become competent and skilled in collecting and preparing statistics such as are herein set out:

That he has examined documents pertaining and bearing upon the facts and statistics herein set out, and had derived said statistics from the said reliable, official or said accepted sources.

That the number of licensed breweries and the amount of beer by them produced in the following named states during the fiscal year ending June 30, 1937, are now set out in the following table, to-wit:

[fol. 147]

State	Number of Breweries	Barrels
Indiana	17	2,254,490
Maryland	12	1,338,893
Nevada	2	21,388
New Hampshire	1	58,824
North Carolina	1	82,293
Pennsylvania	109	6,614,907
Tennessee	3	155,952
Washington	17	915,391
Vermont	0	0

That in the fiscal year ending June 30, 1937, beer was produced in respective states named below by the number of breweries and in the amounts now set out:

State	Number of Breweries	Barrels
Illinois	62	4,059,423
Kentucky	7	986,039
Missouri	20	3,442,809
New York	69	9,230,725
Ohio	55	4,281,448
Wisconsin	86	6,478,420

That during the first nine calendar months in the calendar year 1937 there were in all 603,241 barrels of beer produced outside of and imported into the State of Michigan. During the first ten calendar months in the calendar year 1937 there were imported into the State of Michigan 145,250 barrels of beer produced in the State of Indiana. That substantially all of said 603,241 barrels of said beer imported into the State of Michigan during the said nine months excepting the portion imported from the State of Indiana, were produced and shipped from the states of Illinois, Missouri, Ohio and Wisconsin and substantially no part of said beer produced outside of the State of Michigan and imported into the State of Michigan for sale therein during the said period of nine months was produced or shipped from the States of Maryland, Nevada, New Hampshire, North Carolina, Pennsylvania, Tennessee and Washington and none whatsoever from the State of Vermont. And that during the same period the amount of beer imported into the State of Michigan which was produced in other states of the Union than Michigan amounted to about twenty per cent of the total amount of beer consumed in the State of Michigan. That in [fol. 148] the four state of Illinois, Missouri, Ohio and Wisconsin, which, as above alleged, produced and imported into the State of Michigan in excess of two-thirds of the total amount of beer imported into the State of Michigan during said period, are located the number of breweries as above set out which are capable of producing and importing into the State of Michigan far more beer in addition to that already being imported into the State of Michigan therefrom than was produced in the State of Indiana and shipped into the State of Michigan.

That in the said regulation adopted by said Liquor Control Commission of the State of Michigan on December 14, 1937, the states of Illinois, Missouri, Ohio and Wisconsin are not designated as states having laws containing the provisions which require under said legislation of the State of Michigan the exclusion of beer produced therein."

(This affidavit was duly subscribed and sworn to before a competent Notary Public.)

[fol. 149] Copy

IN UNITED STATES DISTRICT COURT

[Title omitted]

Comes now the plaintiff and appellant in the above entitled cause and lodges the accompanying condensed statement of evidence to be included in the record on appeal, in the office of the clerk of said court, pursuant to Rule 75, paragraph (b) of the Federal Equity Rules.

Harris W. Wienner, McHale, Arthur & Meyers, Thomas F. O'Mara, Herbert J. Patrick, Attorneys for Plaintiff and Appellant.

[fol. 150] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPROVING CONDENSED STATEMENT OF EVIDENCE

Now come the parties in the above entitled cause by counsel, and the plaintiff having heretofore on the 19th day of May, 1938 lodged in the office of the Clerk of the Court the condensed statement of evidence to be included in the record in this cause on appeal to the Supreme Court of the United States, and notice of such lodgment having been given to the defendants on said 19th day of May, 1938 that such plaintiff and appellant would, on the 31st day of May, 1938, at nine-thirty o'clock A. M., at the office of Honorable Edward J. Moinet, Judge of said Court, in the United States court house, at Detroit, Michigan, present the same to the said Court or Judge thereof, and then and there ask the Court or Judge to approve said statement in order that the same may be filed in the office of the Clerk of said Court and become a part of the record for the purpose of the appeal, and the Court, at said time and place, having examined said condensed statement of evidence to be included in the record on appeal, and having heard the parties with regard thereto, now finds that the said condensed statement of evidence is true, complete and properly prepared and that it contains all of the evidence material to a decision of the points presented in the assignment of errors, and that the same should be approved:

[fols. 151-158] It is therefore hereby Ordered by the Court that the said condensed statement of evidence be and the same is hereby approved and the Clerk of the Court is directed to file the same and make the same a part of the record in this cause.

Dated at Detroit, Michigan, this 31st day of May, 1938.

Edward J. Moinet, Judge of the United States District Court.

OK as to form. George W. Heideman, Asst. Attorney General.

[fol. 159] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed May 19, 1938

You are hereby directed to prepare and certify for the purpose of appeal to the Supreme Court of the United States from the orders and decrees made and entered in said cause, which appeal has been heretofore allowed, the following papers, documents, entries and portions of record made and entered in said cause, to wit:

1. Plaintiff's bill of complaint filed in this cause on December 10, 1937.
2. Order of court to show cause returnable December 20, 1937 filed and entered December 10, 1937.
3. Plaintiff's supplemental bill of complaint filed on December 20, 1937.
4. Temporary restraining order issued by the court filed and entered December 20, 1937.
5. Amended bill of complaint and supplemental bill of complaint filed December 27, 1937.
6. Affidavits of Carl A. Frey and Harold C. Feightner.
7. Defendants' motion to dismiss filed December 29, 1937.
8. Order of court extending temporary restraining order for a period of ten (10) days filed and entered January 7, 1938.
9. Order of court extending temporary restraining order for period of ten (10) days filed and entered January 17, 1938.

10. Defendants' amended motion to dismiss filed January 17, 1938.

11. Affidavit of John D. Shea, filed January 17, 1938.

[fol. 160] 12. Order of court extending temporary restraining order filed and entered January 26, 1938.

13. Order book entry showing hearing before three judges on December 29, 1937.

14. Opinion of court filed on February 3, 1938.

15. Proposed special findings of fact and conclusions of law filed by plaintiff on February 23, 1938.

16. Order of court of February 23, 1938, setting same for hearing on February 28, 1938.

17. Defendants' objections to plaintiff's proposed special findings of fact and conclusions of law, filed February 28, 1938.

18. Order and decree of court denying interlocutory injunction and dismissing bill of complaint as supplemented and amended, filed and entered March 7, 1938.

19. Order of court denying motion for special findings of fact and conclusions of law, filed and entered March 7, 1938.

20. Plaintiff's assignments of error, filed April 27, 1938.

21. Plaintiff's petition for appeal filed April 27, 1938.

22. Plaintiff's cost bond on appeal filed and approved by court April 27, 1938.

23. Plaintiff's jurisdictional statement, filed with petition for appeal April 27, 1938.

24. Order of court allowing appeal, filed and entered April 27, 1938.

25. Citations on appeal and proof of service, filed April 30, 1938.

26. Notice under Rule 12, paragraph 2, and proof of service filed April 30, 1938.

27. The statement of the evidence in the cause as the same may hereafter be approved by the said court or judge thereof.

28. Any stipulation or stipulations of counsel which may be hereafter filed.

[fol. 161] You are further instructed to transmit to the clerk of the Supreme Court of the United States at Washington, D. C., certified transcript together with all original papers and statements required under the rules of the Supreme Court of the United States to be transmitted in their original form.

Indianapolis Brewing Company, Appellant and Plaintiff, by Harris W. Wienner, McHale, Arthur & Myers, Thomas F. O'Mara, Herbert J. Patrick, Counsel and Attorneys for the Appellant.

[fol. 162] The undersigned counsel for defendants and appellees hereby acknowledge service of the above and foregoing præcipe this 19th day of May, 1938.

Raymond W. Starr, Atty. Gen. of State of Mich., by John T. Bresnahan, Asst. Atty. Gen., Attorneys for Defendants and Appellees.

[File endorsement omitted.]

[fol. 163] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 164] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF ENLARGEMENT

The above named plaintiff (appellant), Indianapolis Brewing Company, Inc., having duly requested by its verified petition that the time within which said plaintiff (appellant) may docket this cause upon appeal in the Supreme Court of the United States and file the record thereof with the Clerk of said Court, showing good cause why the same should be granted, the said petition is now hereby granted and; it is accordingly ordered that the time within which the Indianapolis Brewing Company, Inc., plaintiff (appellant) in the above entitled cause may cause its appeal in the above and foregoing cause and the record and proceedings therein and other records in connection therewith to be filed [fol. 165] in the office of the Clerk of the Supreme Court of the United States, be and the same is hereby enlarged to and including June 18, 1938.

Edward J. Moinet, District Court Judge.

May 31st, 1938.

[fol. 166] [File endorsement omitted.]

[fol. 167] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed June 18, 1938

Now comes the appellant in the above entitled cause and for its statement of points to be relied upon, adopts its assignments of error.

Further complying with Paragraph 9 of Rule 13, appellant designates the following parts and portions of the record to be printed, which said parts and portions so designated are necessary for a full and fair consideration of the case, to-wit:

1. Bill of complaint as amended and supplemental bill of complaint.
2. Amended motion of defendants to dismiss.
3. Opinion of the Court.
4. Plaintiff's proposed special findings of fact and conclusions of law under Equity Rule 70½.

[fol. 168] 5. Defendants' objections to plaintiff's proposed special findings of fact and conclusions of law.

6. Order denying interlocutory injunction and dismissing bill of complaint as supplemented and amended.
7. Order denying motion for special findings of fact and conclusions of law.
8. Assignments of error.
9. Petition for appeal.
10. Order allowing appeal.
11. Citation.
12. Appellant's statement as to jurisdiction.
13. Statement of evidence and order approving same.
14. Order enlarging time for docketing record.
15. Praecipe for transcript of record.

16. Statement of points to be relied upon and designation as to printing record.

Harris W. Wienner, Frank M. McHale, Herbert J. Patrick, Thomas F. O'Mara, Attorneys for Appellant.

Service of the above points to be relied upon and designation as to printing record is acknowledged this 16th day of June, 1938.

Raymond W. Starr, Atty. Gen'l, State of Mich., by John T. Bresnahan, Asst. Attorney General of the State of Michigan, Counsel for Appellees.

[fol. 169] [File endorsement omitted.]

[fol. 170] IN SUPREME COURT OF THE UNITED STATES

APPELLEES' DESIGNATION AS TO PRINTED RECORD—Filed June 22, 1938

Now come the appellees in the above entitled cause, and complying with paragraph 9 of Rule 13, designate the following additional parts and portions of the record to be printed, which said parts and portion so designated are necessary for a full and fair consideration of the case, to-wit:

1. Appellees' motion to affirm.

For Raymond W. Starr, Attorney General for the State of Michigan; Edmund E. Shepherd, Assistant Attorney General, for Appellees.

[fol. 171] STATE OF MICHIGAN,
County of Ingham, ss:

Horace Craig, being duly sworn, deposes and says that on the 20th day of June, A. D. 1938, he served a true copy of the foregoing appellees' designation as to printed record upon Harris W. Wienner, attorney for appellant, by placing the same in an envelope addressed as follows: Mr. Harris W. Wienner, Attorney at Law, 1177 Penobscot Building, Detroit, Michigan, by prepaying the full first-class postage thereon, and by placing the same in the United States post office at Lansing, Michigan.

Horace Craig.

Subscribed and sworn to before me this 20th day of June, A. D. 1938. Margaret E. Parent, Notary Public, Ingham County, Michigan. My commission expires November 4, 1939.

[fol. 172] [File endorsement omitted.]

Endorsed on cover: File No. 42,615. E. Michigan, D. C. U. S. Term No. 130. Indianapolis Brewing Company, Inc., appellant, vs. The Liquor Control Commission of the State of Michigan, et al. Filed June 18, 1938. Term No. 130, O. T., 1938.

FILE COPY

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FILED
JUN 13 1938
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 130

INDIANAPOLIS BREWING COMPANY, INC.,
Appellant,

vs.

THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

STATEMENT AS TO JURISDICTION.

HARRIS W. WIENNER,
HERBERT J. PATRICK,
THOMAS F. O'MARA,
Counsel for Appellant.

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United States Code Annotated, Title 28, Section 380 (Section 266 of the Judicial Code, as amended) 2

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IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

In Equity. No. 8259.

INDIANAPOLIS BREWING COMPANY, INC., AN INDIANA CORPORATION,
Plaintiff and Appellant,
vs.

THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN, EDWARD W. McFARLAND, HALE G. KNIGHT, AND VEROLD F. GORMELY, INDIVIDUALLY AND AS MEMBERS OF THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN; FRANK MURPHY AND LEON D. CASE, INDIVIDUALLY AND AS MEMBERS EX-OFFICIO OF THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN; RAYMOND W. STARR, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF MICHIGAN,
Defendants and Appellees.

APPELLANT'S STATEMENT AS TO JURISDICTION.

To the Honorable Judges of the Above Entitled District Court of the United States:

Comes now the plaintiff, Indianapolis Brewing Company, Inc., and concurrently with the presentation of its petition for the allowance of an appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division, being a specially constituted Three-Judge Court under Title 28, Section 380 of the United States Code Annotated to the Supreme Court of the United States herewith and hereby presents this statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon such appeal to review the order and decree from which said appeal is taken.

The above named plaintiff-appellant, in support of the jurisdiction of the Supreme Court of the United States to review on appeal the above entitled cause and the order of said Court denying the prayer of said plaintiff-appellant for an interlocutory injunction, and the final decree dismissing the said amended bill in said cause as amended and supplemented, and particularly disclosing the basis therefor, respectfully represents:

A. Statutes Sustaining the Jurisdiction.

That the statutory provision believed to sustain jurisdiction is Section 380 of Title 28 of the United States Code Annotated (Judicial Code, Section 266, as amended) and particularly the following clauses thereof, reading:

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case."
>
> "* * * And a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

B. State Statute, the Validity of Which is Involved.

That the statute of the State of Michigan, the validity of which is involved, is known as Section 40 of Act Number 8 of the Public Acts of the State of Michigan of the Extra Sessions of 1933-1934 (page 16), as amended by Act Number 281 of the Public and Local Acts of the Legislature of the State of Michigan passed at the Regular Session of 1937, page 509.

That the title to said Public Act No. 8 together with Section 40 thereof, both as amended by Act No. 281 above referred to in their said amended form, reads as follows:

> "An act to create a liquor control commission for the control of the alcoholic beverage traffic within the state of Michigan, and to prescribe its powers, duties and limitations; to provide for the control of the alcoholic liquor traffic within the state of Michigan and the establishment of state liquor stores; to provide for the licensing and taxation thereof, and the disposition of the moneys received under this act; to provide for the enforcement and to prescribe penalties for violations of this act; to provide for the confiscation and disposition of property seized under the provisions of this act; to provide a referendum in certain cases; and to repeal certain acts and parts of acts, general, local and special, and certain ordinances and parts of ordinances,"
>
> "SEC. 40. Beer; taxation and discrimination.—There shall be levied and collected by the Commission on all beer manufactured and/or sold in this state a tax at the rate of one dollar and twenty-five cents per barrel if sold in bulk, and in like ratio if sold in smaller quantities, the payment of which shall be evidenced by excise tax beer stamps, caps, lids, or crowns as prescribed by the Michigan liquor control commission, affixed to the barrel, keg, case, or other container, as the case may be by the brewer if manufactured outside this state, whichever shall be designated by the commission, before sale thereof within this state by said wholesaler; Provided, however, That the tax imposed by this act upon beer manufactured in or imported into this state shall be rebated to such manufacturer or wholesaler upon satisfactory proof being furnished to the commission by affidavit or otherwise, as the commission may deter-

mine, that such beer was shipped out of the state for sale and consumption outside the state of Michigan.

"For purposes of taxation a barrel shall be construed to contain thirty-one gallons.

"Any manufacturer duly licensed as aforesaid and who has been paid said license fee shall be exempt from payment of any tax imposed under the provisions of act number one hundred of the public acts of nineteen hundred thirty-one or amendments thereto, commonly known as the malt tax act, for all malt products taxed by said act used in its manufacturing process.

"The commission shall forthwith adopt a regulation designating the states, the laws, or the rules or regulations of which are found to require a licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in this state; or which deny the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license; or which prohibit licensed wholesalers of beer therein from possessing or selling beer purchased in this state, unless the one from whom purchased has secured a license and paid a fee therein, when such seller neither transports the beer into said state nor sells the same therein; or which impose any higher taxes or inspection fees upon beer manufactured in this state when transporting into or sold therein, than is imposed upon beer manufactured and sold within said state, the regulation adopted shall prohibit all licensees from purchasing, receiving, possessing, or selling any beer manufactured in any state therein designated, said regulation to become effective ninety-days after its adoption. Any licensee or person adversely affected shall be entitled to review by certiorari to the proper court the question as to whether the commission has acted illegally or in excess of authority in making its findings with respect to any state."

There is also involved herein the validity of a certain regulation adopted under the authority of said amended Section 40, set out above, by the Liquor Control Commission of the State of Michigan on December 14, 1937, and which regulation is now set out in its entirety, to wit:

> "Pursuant to Act No. 8, Public Acts, Extra Session of the year 1933 of the State of Michigan, as amended by Act No. 241 of the Public Act for the year 1935, and Act No. 281 of the Public Act for the year 1937, particularly Section 40 thereof, the Michigan Liquor Control Commission promulgates and adopts the following rule and regulation designating as discriminatory according to Section 40 of said Act the following States: MAINE, MARYLAND, NEVADA, INDIANA, NEW HAMPSHIRE, NORTH CAROLINA, PENNSYLVANIA, TENNESSEE, VERMONT, WASHINGTON. These designations are made after a careful examination of the laws and rules and regulations of the aforementioned states."

C. Date of Decree and of Application for Appeal.

That the date of the order of said Court denying the prayer of said plaintiff-appellant for an interlocutory injunction herein sought to be reviewed is the 5th day of March, 1938, and the date of the final decree of said Court dismissing plaintiff-appellant's bill of complaint as amended and supplemented, which order is also sought to be reviewed, is the 5th day of March, 1938, and that the date upon which the application for appeal herein is presented is the 27th day of April, 1938.

D. The Nature of the Case, Rulings of the Court, and Substantial Questions Involved.

a. The nature of the above entitled cause was a suit in which both a temporary injunction and a permanent injunction was prayed restraining the defendants as duly constituted officers of the State of Michigan, charged with the enforcement of the said Liquor Control Act of the State of Michigan, and also as individuals, from the enforcement and execution of said amended Section 40, and also from the enforcement and execution of a certain regulation adopted under said amended Section 40 by said Commission on December 14, 1937, which regulation is set out above. This regulation so adopted prohibited all licensees of the State of Michigan, from purchasing, receiving, possessing or selling any beer manufactured in any of the States designated in said regulation, including beer manufactured in the State of Indiana wherein the beer of the plaintiff and of persons in plaintiff's class was manufactured and had been for several years manufactured. This suit sought to declare each and all of said provisions of said amended Section 40 and of the said regulation of the Liquor Control Commission of the State of Michigan void and of no effect as being contrary to and in violation of Section 8, Article I of the Constitution of the United States (The Commerce Clause), and contrary to and in violation of the Fourteenth Amendment of the Constitution of the United States, (as repugnant to both the Equal Protection and Due Process Clauses thereof), and also in violation of Section 2, Article IV of the Constitution of the United States (privileges and immunities of citizens).

Plaintiff's bill as amended and supplemented was brought both on behalf of the plaintiff, a manufacturer of beer whose plant was located in the State of Indiana and who was duly licensed under the laws of Michigan to import beer into and sell the same within the State of Michigan, and on behalf of other manufacturers within the State of Indiana similarly situated, and claimed that the rights and property interest of the plaintiff and of persons of said class were being injured and threatened with injury through the threatened enforcement of the said amended Section 40 of said Act No. 8 of the State of Michigan and the said regulation adopted pursuant thereto by the said Liquor Control Commission of the State of Michigan in violation of said provisions of the Constitution and also in violation of the rights of their customers who were duly licensed wholesalers within the State of Michigan and which rights of the said licensed wholesalers, the customers of said plaintiff and of persons in plaintiff's class, were being injured and threatened with injury in violation of each of the said provisions of the Constitution of the United States above referred to.

b. The plaintiff more particularly contended in its bill of complaint as amended and supplemented in support of its claim, that said amended Section 40 and the regulation of the Liquor Control Commission of the State of Michigan, adopted December 14, 1937, were each in violation of the said provisions of the Federal Constitution in that;

aa. The classification of the manufacturers of beer whose product could be lawfully sold within the State of Michigan and the classification of manufacturers of beer whose product could not be sold within the State of Michigan, based solely on the kind of police statute in force in the several States of their respective domicile, was an unreasonable and arbitrary classification and was without public object.

bb. The State of Michigan exceeded any dispensation from the operation of the Commerce Clause or the Fourteenth Amendment accorded to it under the Twenty-first Amendment of the Constitution of the United States, inasmuch as the said Public Act and regulation thereunder permitted the free and uninterrupted flow of beer into Michigan from States producing far more beer and shipping far more beer into the State of Michigan than was shipped from the State of Indiana or from any or all of the States designated as discriminatory in said regulation, and were not designed or adapted or reasonably related to the regulation or control of the alcoholic traffic into or within the State of Michigan but were intended and designed solely for the purpose of promoting in other States of the Union the sale of beer produced within the State of Michigan by bringing economic pressure upon such other States to abandon the types of law declared discriminatory by said statute of the State of Michigan and which laws of said other States were designed purely for police purposes within the States of their enactment.

cc. The Twenty-first Amendment of the Constitution of the United States does not prevent the provisions of the Fourteenth Amendment and of the Commerce Clause from inhibiting the enactment by the State of Michigan of a law which has no reasonable relation or is not reasonably adapted to policing or controlling traffic into or within Michigan but which is designed and adapted solely to promoting the sale of beer produced in Michigan within the other States of the Union through the erection of a barrier intended exclusively for the pecuniary advantage of the manufacturers of beer located within Michigan.

dd. Said statute and regulation deny to the plaintiff and others similarly situated and also to their customers within the State of Michigan, the equal protection of the law.

ee. Said statute and regulation deny to the plaintiff and others similarly situated and to their customers within Michigan the right to carry on a lawful business recognized and made lawful by the State of Michigan.

ff. They take and destroy property rights of the plaintiff and of said other persons without just cause and reason and without just compensation.

gg. They arbitrarily and unreasonably infringe upon freedom of contract.

hh. They constitute class legislation enacted for the benefit of manufacturers of beer whose plants are located within the State of Michigan.

ii. They are arbitrary, discriminatory and unreasonable interference with interstate commerce.

jj. They have no relation to the public health, morals or welfare of the people of Michigan and are enacted for the avowed purpose of discriminating against manufacturers located in States which refuse to conform to the requirements of the State of Michigan in the enactment of their local police legislation.

kk. They violate in all said particulars and respects the rights of the licensed wholesalers in the State of Michigan who are customers of the plaintiff and of persons in plaintiff's class and with whom plaintiff and said other persons enjoy long established and valuable trade and good-will for the sale of beer manufactured in the State of Indiana.

c. Special findings and conclusions of law

On March 5, 1938, the District Court entered an order denying the petition of the plaintiff for special findings of facts and conclusions of law requested by him and reciting:

> "It appearing that there are no issues of fact presented since no answer has been filed and no evidence received, and since in our opinion heretofore filed we have made the general finding that we accept the facts as stated in the bill of complaint and amendments and the affidavits attached thereto, and have made therein such detailed findings as bear upon the legal and constitutional issues, and since our conclusions of law are with sufficient particularity set forth in the said opinion.
>
> "The petition for special findings of fact and conclusions of law is hereby denied."

The opinion of the court, which is copied *verbatim* in Exhibit I, attached hereto and made a part of this statement, recites in relation to the issues and facts as follows:

> "In conformity with law, a three judge court was specially convened to consider the petition for inter-

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locutory injunction. No answer having been filed—the defendants moving to dismiss—we find the facts, so far as necessary to decision, as alleged in the bill and its accompanying affidavits.

"The plaintiff is engaged in the manufacture of beer in Indiana and its sale in interstate commerce. The defendants are residents and citizens of Michigan and public officers of that state charged with the duty of enforcing its liquor laws and proposing to do so. The plaintiff is a licensee of the Michigan Liquor Control Commission, qualified as an out-of-state manufacturer to ship beer into Michigan, and has built up a valuable business and good will for its product in that state. In July, 1937, the Michigan Legislature amended Section 40, of Act No. 8, of the Public Acts of the Extra Session of 1933 to provide that after its effective date the Liquor Control Commission should forthwith adopt a regulation designating the states, the laws, rules or regulations of which: (1) are found to require a licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in Michigan; or (2) which deny the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license; or (3) which prohibit licensed wholesalers of beer therein from possession or selling beer purchased in Michigan, unless the one from whom it is purchased has secured a license and paid a fee therein, when such seller neither transports the beer into said state nor sells the same therein; or (4) impose any higher taxes or inspection fees upon beer manufactured in Michigan when transported into or sold therein than is imposed upon beer manufactured and sold within said state, and that the regulation so adopted shall prohibit all licensees from purchasing, receiving, possessing, or selling, any beer manufactured in any state therein designated, such regulation to become effective ninety days after its adoption.

"Pursuant to the authority and direction of amended Section 40, the defendant Liquor Control Commission on the 14th day of December, 1937, adopted a regulation as therein provided designating specific states, including Indiana, as discriminatory, and as a result the purchasing, receiving, possessing or selling of any beer manufactured in Indiana will become unlawful after the 14th day of March, 1938. The enforcement of this regulation will injure or destroy the business which the plaintiff has developed in Michigan. The discriminations against Michigan beer by the State of Indiana which led to the proscription of beer from that state by the regulation, are to be found in Sections 8, 9 and 41 of the Indiana Liquor Control Act of 1935. They require that licensed Indiana wholesalers in order to secure an import privilege pay an additional fee of $1500.00 and limit such permits to not more than 100. They require an additional bond for handling out-of-state beer of $10,000 and limit importation to beer which is the absolute property of the permittee."

The court thereupon ordered that the prayer of plaintiff for an interlocutory injunction be denied and "that a hearing upon the merits will add nothing to the applicable or presently conceded facts that relief, both temporary and permanent, is grounded solely upon asserted invalidity of the statute, and the case, unlike *Bordens Co.* v. *Baldwin*, 295 U. S. 194, not being one where evidence is likely to make answer to that question clear, the bill is dismissed with costs to the defendants."

Thus the court did not rule in terms upon the motion of the defendants to dismiss the bill, but that motion is, nevertheless, attached hereto and made a part hereof and marked Exhibit II.

The plaintiff's Bill of Complaint as amended and supplemented alleged in substance, that plaintiff was a corporation and a resident of the State of Indiana, and that all the defendants were residents of the State of Michigan, and as officers of that State were threatening to enforce said amended Section 40 of the above regulation adopted pursuant thereto by the Liquor Control Commission of Michigan on December 14, 1937, effective on March 14, 1938 against plaintiff and persons in the plaintiff's class, being all out-of-state manufacturers and shippers of beer into Michigan, domiciled in the states designated in said regulation, and also against their customers, the licensed wholesalers within Michigan with whom the plaintiff and persons in plaintiff's class had established and were enjoying a valuable trade and good will in the sale of their beer, and that plaintiff's good will and trade were of a value far in excess of Ten Thousand Dollars ($10,000.00); that the matter in controversy involved more than Three Thousand Dollars ($3,000.00) exclusive of interest and costs, and was wholly between citizens of different states and could be fully determined as between them.

By the enforcement of said act and regulation, the trade and good will of plaintiff and persons in plaintiff's class would be entirely destroyed and were being damaged by the threatened enforcement of said statute and regulation, which were in violation of Section 8, Article 1 (Commerce Clause) of the Federal Constitution, and the Fourteenth Amendment thereof (Due Process and Equal Production Clauses). The bill set out in detail the factual situation with reference to the importation of beer into Michigan, and also detailed statistics relating thereto. This portion of the Bill is set out in Exhibit III attached hereto and made a part hereof. The facts and statistics thus alleged were, as indicated in the quotation above set out, from the Court's opinion found to be true. Upon these facts and statistics so found, the plaintiff bases its contention that the statute and regulation thereunder were without bearing upon or in relation to the control of the importation of beer into or the traffic in beer within the State of Michigan.

(d) The District Court abused its discretion in refusing to grant plaintiff's prayer for an interlocutory injunction inasmuch as:

(aa) The facts were not in dispute. As shown by the special findings of fact the allegations of the plaintiff's amended bill were taken as true; and the said facts indisputably show that the statute and regulation made in pursuance thereof by the Liquor Commission of the State of Michigan was not intended or designed and was not apt to regulate or control the domestic traffic in beer within the State of Michigan and that beer would continue to be imported from States which were not designated in said regulation in far greater quantities than the amount of beer which would be excluded from the State of Indiana and that whatever exclusion of Indiana beer would occur by reason of said regulation, the place thereof would be taken by beer imported from the larger beer importing States and that consequently there was no injury or damage to the State of Michigan and no effect whatever upon the administration and enforcement of its liquor laws; that on the contrary even the threatened enforcement of said regulation sought to be enjoined was undoubtedly causing immediate and irreparable loss of the trade and good will of the plaintiff and ~~persons~~ in the plaintiff's class and the customers of said plaintiff, namely, the beer wholesalers and retailers who purchased the beer manufactured by the plaintiff within the State of Michigan; that the statute and regulation in question clearly exceeded the power of the Legislature of Michigan to enact by reason of the Commerce Clause and the Fourteenth Amendment, each of which were invoked by the said plaintiff, and clearly the said section of the Twenty-first Amendment does not extend any dispensation to a State to legislate for the sole purpose of promoting the sale of its beer throughout other States by coercing such other States into modifying their police regulations governing the alcoholic traffic through threatened loss of a market for their own manufacturers.

E. Cases Sustaining Jurisdiction.

Cases believed to sustain the jurisdiction of this appeal are as follows:

Oklahoma Gas & Elec. Co. v. *Oklahoma Packing Co.*, 299 U. S. 386, 390, 54 Sup. Ct. 732, 734;

Stratton v. *St. Louis S. W. Railway Co.*, 292 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 135;

Brucker v. *Fisher* (6 C. C. A. Mich. 1931), 49 F. (2d) 759.

F. Consideration of Case Not Foreclosed by State of California v. Young's Market Co., 299 U. S. 59.

The consideration of the questions involved in this appeal is not foreclosed by State Board of Equalization of the *State of California* v. *Young's Market Company*, 299 U. S. 59.

The classifications dealt with in the case just cited consisted of all manufacturers of beer located outside the State of California as one class and all manufacturers of beer located inside the State of California as another class. It was this classification and not a classification of the kind involved in the instant case that was held to be "recognized by the Twenty-first Amendment." For in the very next sentence in this decision the Court declared, "However, the classification and taxation made by California *rests on conditions requiring difference in treatment*" (our italics) (page 64). The decision just cited thus indicates the applicability in the proper case of the Commerce Clause and the Fourteenth Amendment.

The Court also declared on page 64:

> "The plaintiff insists that to sustain the exaction of the importer's license fee would involve a declaration that the Amendment has, in respect to liquor, freed the States from all restrictions upon the police power to be found in other provisions of the Constitution. The question for decision requires no such generalization."

The classification created by the Michigan statute here involved does not consist of the manufacturers of beer domiciled in Michigan as one class, and out of State manufacturers as another class. Instead the classification consists of the manufacturers of beer within Michigan as one class, the manufacturers of beer domiciled in States the laws of which are not denounced by amended section 40 of the Michigan Act as disqualifying the beer there made for admission into Michigan and sale therein as another class, and the manufacturers of beer domiciled in States the laws of which contain provisions which under the challenged Michigan Act disqualify the beer produced in such States from entry into Michigan as a third class. The basis for the classification lies, as among out of State manufacturers, in what provisions are contained in the laws of the States of the domicile of the manufacturer,

In other words the Michigan Act is purely of the retaliatory type and its application hinges entirely upon the laws of a sister State. The statute under consideration in *Board v. Young's Market Co., supra,* was not of the retaliatory type. The classification attempted by the Michigan Act is certainly not that recognized by the Twenty-first Amendment.

This case therefore presents an entirely novel question under the Constitution involving the construction of the

Commerce Clause and the Fourteenth Amendment in their relation to the second section of the Twenty-first Amendment.

HARRIS W. WIENNER,
HERBERT J. PATRICK,
THOMAS F. O'MARA,
Attorneys and Solicitors
for Plaintiff-Appellant,
Indianapolis Brewing Co., Inc.

EXHIBIT 1.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Equity No. 8269.

INDIANAPOLIS BREWING COMPANY, INC., an Indiana Corporation, *Plaintiff*,

vs.

THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN *et al.*, *Defendants*.

Before Simons, Circuit Judge, and Moinet and O'Brien, District Judges

SIMONS, *Circuit Judge.*

The plaintiff is a brewing corporation of the State of Indiana, and brings this suit by bill in equity against the members of the Michigan Liquor Control Commission, the Governor and Secretary of State as ex-officio members of the Commission, and the State's Attorney General, to restrain by temporary and permanent injunction the enforcement of certain provisions of the State Liquor Law on the ground that they are violative of both Federal and State Constitutions. In conformity with law, a three judge court was specially convened to consider the petition for interlocutory injunction. No answer having been filed—the defendants moving to dismiss—we find the facts, so far as necessary to decision, as alleged in the bill and its accompanying affidavits.

The plaintiff is engaged in the manufacture of beer in Indiana and its sale in interstate commerce. The defendants are residents and citizens of Michigan and public officers of that state charged with the duty of enforcing its liquor laws and proposing to do so. The plaintiff is a licensee of the Michigan Liquor Control Commission, qualified as an out-of-State manufacturer to ship beer into Michigan, and has built up a valuable business and good will for its product in that state. In July, 1937, the Michigan Legislature amended Section 40, of Act No. 8, of the Public Acts of the Extra Session of 1933 to provide that after its effective date the Liquor Control Commission should forthwith adopt a regulation designating the states, the laws, rules or regulations of which: (1) are found to require a licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in Michigan; or (2) which deny the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license; or (3) which prohibit licensed wholesalers of beer therein from possession or selling beer purchased in Michigan, unless the one from whom it is purchased has secured a license and paid a fee therein, when such seller neither transports the beer into said state nor sells the same therein; or (4) impose any higher taxes or inspection fees upon beer manufactured in Michigan when transported into or sold therein than is imposed upon beer manufactured and sold within said state, and that the regulation so adopted shall prohibit all licensees from purchasing, receiving possessing or selling, any beer manufactured in any state therein designated, such regulation to become effective ninety days after its adoption.

Pursuant to the authority and direction of amended Section 40, the defendant Liquor Control Commission on the 14th day of December, 1937, adopted a regulation as therein provided designating specific states, including Indiana, as discriminatory, and as a result the purchasing, receiving, possessing or selling of any beer manufactured in Indiana will become unlawful after the 14th day of March, 1938. The enforcement of this regulation will injure or destroy the business which the plaintiff has developed in Michigan. The discriminations against Michigan beer by the State of Indiana which led to the proscription of beer from that state by the regulation, are to be found in Sections 8, 9 and 41 of the Indiana Liquor Control Act of 1935. They require that licensed Indiana wholesalers in order to secure an import privilege pay an additional fee of $1500.00, and limit such permits to not more than 100. They require an additional bond for handling out-of-state beer of $10,000, and limit importation to beer which is the absolute property of the permittee.

While the bill assails validity in respect to numerous provisions of the Federal and State Constitutions, the issue, upon consideration of the decision in *State Board of Equalization* v. *Youngs Market Co. et al.*, 299 U. S. 51, followed and applied by a local three judge court in *Zukaitis et al.* v. *Fitzgerald et al.*, 18 Fed. Supp. 1000, has now been narrowed in argument and briefs to a considefation of the assailed statute in respect to invalidity under the "Equal Protection Clause" of the Fourteenth Amendment. This is the plaintiff's main reliance.

Conceding that under the Young's Market case a state may in the exercise of its police power, now freed by the Twenty-first Amendment from the restraint of the commerce clause, discriminate against out-of-state beer, or against persons importing or dealing in such beer and likewise conceding under compulsion of that decision that a classification which distinguishes in treatment as between local beer and out-of-state beer does not offend the equal protection clause, the plaintiff urges that a classification which differentiates the product of certain states from that of other states is wholly arbitrary and capricious, and void under the equal protection clause. There exists no reasonable basis, it says, for this difference of treatment, and the regulation has no relation to the exercise of the police power of the state in protecting the health, safety, morals and welfare of its people. Nor does it aid in policing the state's regulatory laws governing the manufacture and sale of beer. Its purpose, it contends, is purely retaliatory and economic, for Michigan has no concern with the laws of other States and no power to impose its will by economic restrictions or prohibitions upon the law making power of other states. Nor has it the power to enact statutes or adopt regulations the enforcement of which may be subject to the exercise of legislative power in another state.

We have carefully examined the contentions thus stated. That the scope of state police power, except as it may have been restricted by constitutional grant of power to the Federal Government, is not limited by narrow connotations to be assigned to the historic phrase "the protection of the health, safety and morals of the people," would seem to be fairly clear upon consideration of many decisions. *L. S. and M. S. Railroad Co.* v. *Ohio*, 173 U. S. 285; *C. B. & Q. Railroad Co.* v. *Drainage Commission*, 200 U. S. 361, 592; *Mutual Loan Co.* v. *Martell*, 222 U. S. 225; *Barbier* v. *Connelly*, 113 U. S. 27; *Cox* v. *Texas*, 202 U. S. 446. Were there still doubt of the extent of such power as is sought to be exercised in the presently considered enactment it would, we think be received by the recent decision of the Supreme Court in the Louisiana Chain Store case (*Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412), wherein it was thought to reach to the promotion of "fair competitive conditions and to the equalization of economic advantages," and where it was also thought not limited by the fact that "the evils requiring regulation arise solely from operations * * * in part the result of extrastate transactions."

It is true, of course, that arbitrary discriminations and classifications without reasonable basis, are repugnant to a system of constitutional limitations, and may offend against the letter of the equal protection clause. But courts will not lightly assume legislative arbitrariness and caprice, and will not "declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators." No, "A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it * * *." *Metropolitan Co.* v. *Brownell*, 294 U. S. 580.

That the discrimination of the statute here assailed and the regulation adopted in pursuance thereof are not directed specifically against the industries of Indiana or their customers in Michigan is clear, for nine other states are in the same classification, and it operates equally upon all. Let it be conceded that a classification, even though general in terms, may still be unreasonable and arbitrary, such is not the case here. The long history of efforts by state and national governments to control and regulate the manufacture and sale of alcoholic beverages, culminating in the adoption of the prohibitory Eighteenth Amendment and its repeal by the Twenty-first Amendment, with the qualification incorporated therein, demonstrates beyond peradventure that the manufacture and sale of alcoholic liquors are peculiarly subject to abuse, and that the public interest requires their most careful supervision. To that end states generally limit the number of persons who may engage therein require licenses and bonds, and inquire into the character, reputation, and financial ability of permittees. Where the industry is legalized there is a vital state interest in the economic stability of those who are permitted to engage in it, to the end that the usually high taxes and license fees may be promptly paid and that difficult competitive conditions may not tempt them to sharp practice and law evasion. Strict numerical limitation upon manufacturers, wholesalers, and retailers, is sufficiently demonstrative. Michigan finding the markets of other states closed to its own industry while its own market is open to unlimited competition, is free to seek legislative correction of an unequal competitive condition within the limits of its power. It may not, of course, exercise extraterritorial power or control the legislatures of its sister states, but it is idle to deny it power to regulate its own industry and control its own market to the extent that its industries are elsewhere excluded, and to the extent that such exclusion threatens their economic stability, and it is not an unreasonable classification to discriminate against out-state products in respect to their source when the laws of the state of original create the evil sought to be remedied and the classification operates equally upon all who fall within its reach.

It is not sound challenge to this power to say that the Michigan Act will not effectuate the legislative purpose since the closing of its doors to beer of ten states will only bring a greater flow of beer into Michigan from the larger producing states of which Indiana is not one. The contention is based on speculation, but even if it rested upon fact it is still tenuous, for, "the Legislature is not required to make meticulous adjustments in an effort to avoid incidental hardships. It is enough that the classification has reasonable relation to the differences * * *" *Atlantic & Pacific Tea Co.* v. *Grosjean, supra,* 424. Power is not to be denied merely because it might have been more wisely or more effectually exercised.

The plaintiff relies very largely for support to its assault upon the reasonableness of the classification upon the decision of a three-judge court in Minnesota in the case of *Joseph Triner Corp.* v. *Mahoney, State Control Commissioner*, 11 Fed. Supp. 145, decided originally before the announcement of the decision in the Young's Market case but thereafter to the same effect under the style *Triner Corp.* v. *Arundel*, 20 Fed. Supp. 1019. It is sufficient to say that the Triner case involved a classification wholly dissimilar to that here considered, that the Minnesota court found no reasonable basis for it, while for that here involved we do.

Notwithstanding an early concession that the validity of the regulation adopted by the Commission is not involved in this action except insofar as dependent upon the validity of the law authorizing it, the plaintiff makes belated effort to demonstrate that the Indiana Liquor Law does not substantially discriminate against out-state beer. We are not confronted, however, with choice of accepting one or two consistent positions, for neither the bill nor the amended bill allege infirmity in the regulation if the law be valid. Had such issue been raised it might have been met by the defense of adequate legal remedy under the provision contained in Section 40 that "Any licensee or person adversely affected shall be entitled to review by certiorari to the proper court the question as to whether the Commission had acted illegally or *in excess of authority in making its finding with respect to any state*". The question not being here, we do not, of course, decide it.

Our conclusion is that the assailed Michigan statute is constitutionally valid. There being no other ground upon which it is sought, the prayer for interlocutory injunction is denied. It appearing also that a hearing upon the merits will add nothing to applicable or presently conceded facts, that relief, both temporary and permanent, is grounded solely upon asserted invalidity of the statute, and the case, unlike *Borden's Co.* v. *Baldwin*, 295 U. S. 194, not being one where evidence is reasonably likely to make answer to that question clearer.

The bill is dismissed, with costs to the defendants.

Charles C. Simons,
Circuit Judge.
Edward J. Moinet,
District Judge.
Ernest A. O'Brien,
District Judge, c/o C. C. S.

February 3, 1938.

EXHIBIT II.

In Equity No. 8269.

Amended Motion to Dismiss:

"Come now the above named defendants, and each of them, and amend their Motion to Dismiss heretofore filed, and as further grounds and reasons for their Motion to Dismiss the Bill of Complaint, the Supplemental Bill of Complaint and the Amendments to the Bill of Complaint and Supplemental Bill of Complaint heretofore filed, state:

1. That said Bill of Complaint, Supplemental Bill of Complaint and the Amendments thereto fail to show that the plaintiff is entitled to the relief therein demanded or to any relief whatsoever, in that:

(a) Section 40 of Act No. 8 of Public Acts of the State of Michigan of 1937, as amended, was enacted by the Legislature of the State of Michigan pursuant to the authority and within the limits of the Twenty-first Amendment to the Constitution of the United States of America;

(b) That there is in force in the State of Indiana laws, rules and regulations which discriminate against beer manufactured within the State of Michigan in manner prohibited by said Section 40, in that the laws, rules and regulations in force in the State of Indiana require a licensed wholesaler of beer within the State of Indiana, who has paid a license fee of One Thousand Dollars ($1,000.00) for such privilege, to secure an additional license called a "port of entry" permit, for which a further fee of Fifteen Hundred Dollars ($1500.00) is required to be paid for the privilege of importing into and selling within the State of Indiana beer manufactured in the State of Michigan;

(c) That said laws, rules and regulations now existing within the State of Indiana are further discriminatory in that they deny the issuance of such license authorizing the importation of beer manufactured within the State of Michigan to any duly licensed wholesaler of beer within the State of Indiana who may make application for such license, but, on the contrary, limit the issuance of such additional "port of entry" permits to not more than one hundred (100) thereby limiting the number of licensees who may purchase and import beer manufactured within the State of Michigan.

(d) That by reason of the existence of such laws and regulations within the State of Indiana, said State has been properly designated by the Liquor Control Commission of the State of Michigan as one in which discriminatory laws, rules and regulations exist.

2. That said Section 40 of the Michigan Liquor Control Act does not violate Section 8 of Article I of the Constitution of the United States for the reason that the Twenty-first Amendment to said Constitution abrogated the right to import free so far as intoxicating liquors were concerned.

3. That said Section 40 of the Liquor Control Act does not violate Section 10 of Article I of the Constitution of the United States for the reason that the prohibitions of said Section are only applicable to licensees purchasing, receiving, possessing or selling beer manufactured in any State designated by the Liquor Commission in a regulation, which State has been found to discriminate against beer manufactured within the State of Michigan, and that the revocation of the license of any person violating such regulation would not amount to an impairment of an obligation of a contract for the reason that a license to deal in intoxicating liquor is

but a mere personal privilege granted by the Legislature of a State and is subject to the terms and meaning of Section 10 of Article I of the Constitution of the United States.

4. That said Section 40 of the Michigan Liquor Control Act does not violate Section 2 of Article 4 of the Constitution of the United States for the reason that the plaintiff is a corporation, organized and existing under the laws of the State of Indiana, and is not a citizen entitled to claim the benefits of the Privileges and Immunities Clause.

5. That said Section 40 of the Michigan Liquor Control Act does not violate the Fourteenth Amendment to the Constitution of the United States for the following reasons:

(a) The plaintiff corporation is not a citizen of the United States whose privileges or immunities are abridged by said Act;

(b) The plaintiff corporation is not a person within the jurisdiction of the State of Michigan which is denied the equal protection of the laws for the reason that the Bill of Complaint shows that said plaintiff corporation is organized and existing under the laws of the State of Indiana; said Bill of Complaint fails to allege facts which would amount to "doing business' by said corporation within the State of Michigan or which would subject it to the service of process therein. Said Bill of Complaint further fails to show that it has complied with the requirements of Statute of the State of Michigan which are prerequisite to its right to do business therein as a foreign corporation or which would subject it to or bring it within the jurisdiction of the State of Michigan.

(c) That said Section 40 of the Michigan Liquor Control Act does not violate the Fourteenth Amendment or the Equal Protection of the law's provision thereof, in that the Twenty-first Amendment recognizes and permits a State to classify intoxicating liquor which is manufactured outside thereof in a manner other and different than the same kind of intoxicating liquors which are manufactured within said State, and such classification recognized by the Twenty-first Amendment is not forbidden by the Fourteenth.

6. That said Michigan Liquor Control Act and, particularly, Section 40 thereof, is not unconstitutional because of an unwarranted delegation of legislative power for the reason that said Section clearly defines and prescribes the conditions and circumstances under which said Section is made operative and nothing remains to be done by the Liquor Control Commission except to determine the fact as to whether the legislation or the rules or regulations of another State conform to the terms and conditions prescribed in said Section 40.

Raymond W. Starr,
Attorney General;
George H. Heideman,
Assistant Attorney General;
Edmund E. Shepherd,
Assistant Attorney General,
Attorneys for the Above
Named Defendants.

(The affidavit of John D. Shea verifying the foregoing Motion to Dismiss and the Exhibits A, B, and C referred to therein and containing only Section 8, 9, and 41 of the Indiana Alcoholic Beverage Act are omitted.)

EXHIBIT III.

(Paragraph H in Clause Eleven of Plaintiff's Amended and Supplemented Bill.)

H. In the ten states designated by the said State Liquor Control Commission in their said regulation of December 14, 1937, the number of licensed breweries and the amount of beer by them produced during the fiscal year ending June 30, 1937, are now set out in the following table, to-wit:

State.	Number of Breweries.	Barrels.
Indiana	17	2,254,490
Maryland	12	1,338,893
Nevada	2	21,388

State	Number of Breweries.	Barrels.
New Hampshire	1	58,824
North Carolina	1	82,293
Pennsylvania	109	6,614,907
Tennessee	3	155,952
Washington	17	915,391
Vermont	0	0

That in the fiscal year ending June 30, 1937, beer was produced in respective states named below by the number of breweries and in the amounts now set out:

State.	Number of Breweries.	Barrels.
Illinois	62	4,059,423
Kentucky	7	986,039
Missouri	20	3,442,809
New York	69	9,230,725
Ohio	55	4,281,448
Wisconsin	86	6,448,420

That during the first nine calendar months in the calendar year 1937 there were in all 603,241 barrels of beer produced outside of and imported into the State of Michigan. During the first ten calendar months in the calendar year 1937 there were imported into the State of Michigan 145,250 barrels of beer produced in the State of Indiana. That substantially all of said 603,241 barrels of said beer imported into the State of Michigan during the said nine months excepting the portion imported from the State of Indiana, were produced and shipped from the states of Illinois, Missouri, Ohio and Wisconsin and substantially no part of said beer produced outside of the State of Michigan and imported into the State of Michigan for sale therein during the said period of nine months was produced or shipped from the states of Maryland, Nevada, New Hampshire, North Carolina, Pennsylvania, Tennessee, and Washington and none whatsoever from the State of Vermont. And that during the same period the amount of beer imported into the State of Michigan which was produced in other states of the Union than Michigan amounted to about twenty per cent of the total amount of beer consumed in the State of Michigan. That in the four states of Illinois, Missouri, Ohio and Wisconsin, which, as above alleged, produced and imported into the State of Michigan in excess of two-thirds of the total amount of beer imported into the State of Michigan during said period, are located the number of breweries as above set out which are capable of producing and importing into the State of Michigan far more beer in addition to that already being imported into the State of Michigan therefrom than was produced in the State of Indiana and shipped into the State of Michigan.

That in the said regulation adopted by said Liquor Control Commission of the State of Michigan on December 14, 1937, the states of Illinois, Missouri, Ohio and Wisconsin are not designated as states having laws containing the provisions which require under said legislation of the State of Michigan the exclusion of beer produced therein.

That in fact the laws of the states which are not designated in the said regulations of the Liquor Control Commission of the State of Michigan do not contain provisions requiring the exclusion of beer produced therein under the said legislation of the State of Michigan.

That in truth and fact the type of liquor control statute described in said amended Section 40 herein complained of has no bearing or relation to the amount of beer produced in any of the said states and shipped into the State of Michigan and the fact whether or not laws of any of said states contain provisions which require or do not require the exclusion of beer produced therein under said Section 40 has no bearing upon or relation to the amount of beer produced therein and shipped into the State of Michigan and the said standards prescribed in said statute of the State of Michigan for the admission or exclusion of beer produced in other states according to the provisions of the laws of other states having no bearing or relation in fact to the amount of beer made in any state and shipped therefrom into the State of Michigan or any bearing or relation to the control of liquor traffic in the State of Michigan.

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[illegible]

[illegible]

[illegible]

Indianapolis, Indiana.

THOMAS [illegible]

[illegible]

Terre Haute, Indiana.

[illegible] Counsel for [illegible]

[illegible]

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IN THE

Supreme Court of the United States.

INDIANAPOLIS BREWING COMPANY, INC., an Indiana Corporation, Appellant, v. THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN; EDWARD W. McFARLAND, HALE G. KNIGHT, and VEROLD F. GORMELY, Individually and as Members of the Liquor Control Commission of the State of Michigan; FRANK MURPHY, and LEON D. CASE, Individually and as Members ex officio of the Liquor Control Commission of the State of Michigan; RAYMOND W. STARR, Individually and as Attorney-General of the State of Michigan, Appellees.	No. ....

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM THE ORDERS OF THE DISTRICT COURT.

I.

STATEMENT OF THE CASE.

This is an appeal from an order and decree of the District Court of the United States for the Eastern District of Michigan, Southern Division, with three judges sitting, under Section 266, Judicial Code (28 U. S. C. A., par. 380), entered March 7, 1938, denying the appellant's prayer for an interlocutory injunction dismissing the appellant's bill of complaint. The appellant's bill sought both an interlocutory injunction and a permanent injunction against the Liquor Control Commission of the State of Michigan and its coappellees, being the law-enforcing officers of the State of Michigan, restraining the appellees from enforcing Section 40 of Act No. 8 of the Public Acts of the State of Michigan, Extra Session, 1933, as amended by Act No. 281, Public Acts of the State of Michigan, 1937, and from enforcing a regulation of said Commission made on the 14th day of December, 1937, under color of the authority of amended Section 40.

An appeal having been allowed the appellant on April 27, 1938, and the requisite papers and notices having been served upon the appellees, the appellees, by counsel, filed in the District Court below a motion to affirm the judgment of the lower court, with supporting brief.

II.

GROUNDS URGED BY APPELLEES.

The reasons urged by the appellees for affirming the orders appealed from are solely to the effect that the questions involved are unsubstantial, and that their decision is foreclosed by a former decision of the Supreme Court of the United States.

The appellant joins issue with these contentions.

III.

NATURE OF THE QUESTIONS INVOLVED.

The constitutionality of the following amended Section 40 of the Michigan Act cited above and of regulation adopted thereunder, and hereinafter set out, constitutes the question involved.

(Amended Section 40 of the Michigan Act:)

> "The commission shall forthwith adopt a regulation designating the states, the laws, or the rules or regulations of which are found to require a licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in this state; or which deny the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license; or which prohibit licensed wholesalers of beer therein from possessing or selling beer purchased in this state, unless the one from whom purchased has secured a license and paid a fee therein, when such seller neither transports the beer into said state nor sells the same therein; or which impose any higher taxes or inspection fees upon beer manufactured in this state when transporting into or sold therein, than is imposed upon beer manufactured and sold within said state, the regulation adopted shall prohibit all licensees from purchasing, receiving, possessing, or selling any beer manufactured in any state therein designated, said regulation to become effective ninety days after its adoption. Any licensee or person adversely affected shall be entitled to review by certiorari to the proper court the question as to whether the commission has acted illegally or in excess of authority in making its finding with respect to any state."

(Regulation of Liquor Control Commission:)

> "Pursuant to Act No. 8, Public Acts, Extra Session of the year 1933 of the State of Michigan, as amended by Act No. 241 of the Public Act for the year 1935, and Act No. 281 of the Public Act for the year 1937, par-

> ticularly Section 40 thereof, the Michigan Liquor Control Commission promulgates and adopts the following rule and regulation designating as discriminatory according to Section 40 of said Act the following States: Maine, Maryland, Nevada, Indiana, New Hampshire, North Carolina, Pennsylvania, Tennessee, Vermont, Washington. These designations are made after a careful examination of the laws and rules and regulations of the aforementioned states."

The above-quoted statutory provisions and regulations are set out in paragraph B of appellant's jurisdictional statement filed with his petition for appeal.

It appears from the grounds of challenge, particularly set out under paragraph D (aa), (bb), (cc) and (dd) in the jurisdictional statement that the validity of the foregoing statute and regulation is challenged as being in conflict with the Commerce Clause, the Equal Protection Clause and the second clause of the Twenty-first Amendment of the Federal Constitution because this statute is not designed to police or regulate the alcoholic traffic within the State of Michigan, but is designed solely to constrain the other states of the Union to alter their present policing regulations and to permit the sale of Michigan beer within such other states free of such policing regulations; and in respect to the Fourteenth Amendment, because the act created an unreasonable classification, not as between the manufacturers of beer in the State of Michigan as one class and all the manufacturers of beer outside the State of Michigan as another class but because it arbitrarily and unreasonably classified the manufacturers whose plants were located outside the State of Michigan with reference to whether or not the laws of their respective domiciles contained or did not contain the provisions obnoxious to amended Section 40 of the Michigan act.

The holding of the court below appears in 21 Fed. Supp. 969 (Current Advance Sheets March 21, 1938).

IV.

NOVELTY OF THE QUESTION.

The constitutionality of liquor legislation of the purely retaliatory type has not yet been presented to this Court. The statute of Michigan is unquestionably a statute of this type. It is quite apparent, as will be more specifically noted below, even from the opinion of the Three-Judge Court upholding the statute that the statute makes no pretense at having for its object the regulation or control of the liquor traffic **within the State of Michigan.** The undisputed object of the statute is to constrain such sister states as may have policing regulations which, while not prohibiting the importation of beer from the State of Michigan, provide a differentiation of method in the handling of imported beer from that applied to domestic beer. The pressure applied to the legislatures of the sister states consists in the exclusion of beer produced in such states from importation into Michigan until such time as the legislatures of the sister states conform to the Michigan standards. The ultimate object of the law is to promote throughout other states in the Union the sale of beer produced in Michigan.

The opinion of the court below pays scant heed to these considerations, and holds that because the sale of Michigan beer in other states would promote prosperity within Michigan the challenged law has a legitimate object within the police power of the state, and is not violative of the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution, The court below ignored, although it did not deny, the presence in appellant's bill of complaint of appellant's contention that amended Section 40 was also violative of the Commerce Clause of the Federal Constitution, which contention of the appellant was plainly made in his amended and supplemental bill of complaint. (See clauses 5 and 11 in the amended and supplemental bill of complaint, and, also, paragraph D-e in appellant's jurisdictional statement.) The appellant recited in its bill that it had long been engaged in shipping beer manufactured in its plant in Indiana into Michigan as a licensed importer to the licensed wholesalers in the State of Michigan, and that it enjoyed a valuable trade and good will in respect to the beer manufactured in Indiana and shipped into Michigan.

V.

CONTENTIONS OF THE APPELLANT.

The appellant contends that as to both the immediate object of the law—namely, the constraint upon the several states to abandon their sovereignty under the Twenty-first Amendment to enact policing regulations governing the importations of foreign beer—and as to the further object of the law to secure the uninterrupted flow of beer as a commodity in interstate commerce free from the vexations of local police regulations, the Michigan statute contravenes the policy of the Twenty-first Amendment, seeks to defeat the purpose of the amendment, and therefore cannot be within the intent of the amendment. In fact, the Michigan act was enacted to bring about a state of affairs which the second clause of the Twenty-first Amendment sought to prevent forever—namely, interference with the police regulations of a state governing alcoholic beverages originating outside of its jurisdiction. Moreover, since the object of the Michigan statute is extraterritorial, inasmuch as it seeks to break down police barriers erected by a sister state, it constitutes a serious threat to the integrity of the Twenty-first Amendment itself.

The appellant further contends that amended section 40, in view of the foregoing considerations and the further necessary effect thereof, arbitrarily classifies the manufacturers of beer whose plants are located outside the State of Michigan in states where the laws do not conform to the standards of the Michigan act as one class, and manufacturers of beer whose plants are located outside Michigan in states where the laws do not conform to the standards as another class. That this classification is not prescribed by the second clause of the Twenty-first Amendment, and violates the equal-protection clause of the Fourteenth Amendment.

In fine, the appellant contends the type of law which a sister state may enact in policing alcoholic traffic within or into its territory cannot be made the criterion of the exclusion of the beer produced therein from importation into another state, and that such an act is unconstitutionally designed to accomplish extraterritorial objects and to obstruct the achievement of the purpose of the Twenty-first Amendment, and violates the commerce clause and the Fourteenth Amendment.

We submit that these questions are not only undetermined by previous decisions of this Court, but are essentially substantial questions.

VI.

OBSERVATIONS AND AUTHORITIES IN SUPPORT OF APPELLANT'S CONTENTIONS.

Exhibit III, attached to the appellant's statement of jurisdiction, quotes paragraph H in clause 11 of the plaintiff's amended and supplemental bill, which was expressly found to be true by the Court. This portion of the bill alleged in detail the statistics of the importations into Michigan of beer from the ten states named in the regulation, the products of which were thereby barred from Michigan, and alleged that of the ten states named in the regulation Vermont has no breweries and consequently imports no beer into Michigan; that the States of Maine, Nevada, New Hampshire, North Carolina, Tennessee and Washington, remotely situated from the State of Michigan, have not shipped any alcoholic malt beverages into that state, and that of the remaining three states, Maryland, Pennsylvania and Indiana, the latter is the only state which has been selling any substantial amount of alcoholic malt beverages in Michigan; and, further, this portion of the bill set out in detail the number of breweries and production of beer within the States of Illinois, Missouri, Ohio and Wisconsin, which latter states were not barred from shipping into Michigan, and disclosed, quoting from the bill:

> "That in the four States of Illinois, Missouri, Ohio and Wisconsin, which, as above alleged, produced and imported into the State of Michigan in excess of two-thirds of the total amount of beer imported into the State of Michigan during said period, are located the number of breweries as above set out which are capable of producing and importing into the State of

Michigan far more beer in addition to that already being imported into the State of Michigan therefrom than was produced in the State of Indiana and shipped into the State of Michigan."

It follows that in the face of the Court's own finding of fact, the Court made an unsound assumption that the purpose of the Act was to protect the Michigan market for domestic beer. If such was the case, legislation would naturally be directed toward excluding the outstanding beer-producing States of Illinois, Missouri, Ohio and Wisconsin, which poured more than two-thirds of all foreign importations of beer into Michigan within the long period set out in the bill, and not toward states which either produced no beer or actually shipped but a relatively small amount of beer into Michigan.

As determined therefore not by the assumption of the Court, but by its actual findings, the entire purpose of the legislation was to promote the sale of beer outside that state. In other words, it was directly aimed at achieving an extraterritorial effect both in respect to the economic pressure thereby applied to the Legislature of its sister states, but also in respect to the promotion of the sale of Michigan beer outside its territory.

Of course, the Court's opinion nowhere denies in terms that a purely retaliatory statute is unconstitutional and not within the purview of the Twenty-first Amendment. The Court in its opinion observes:

> "It is not an unreasonable classification to discriminate against out of state products in respect to their source, when the laws of the state of origin create the evil sought to be remedied and the classification operates equally upon all who fall within its reach."

There is, therefore, an implied concession, even in the opinion of the Court, that the evils sought to be remedied actually consist in the provisions of the statutes of a sister state, although those statutes are warranted under the Twenty-first Amendment and are purely of a police character.

It is undeniable that the thrust of this retaliatory type of legislation is ulterior, involves the national economy and disturbs the harmonious relationships of the states within the Union.

The situation is analogous to the Louisiana statute denounced in Foster-Fountain Packing Co., Inc., et al. v. E. J. Haydel et al., 278 U. S. 1, 13, the opinion in which pointed out that:

> "The purpose is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of the brand in Louisiana by holding raw unshelled shrimp from the Biloxi (Miss.) plants."

In Pennsylvania v. West Virginia, 262 U. S. 553, 593, the opinion of the Court, speaking of the Commerce Clause, runs:

> "The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference from conflicting or hostile state laws and to insure uniformity and regulation. It means that in the matter of interstate commerce we are a single nation, one and the same people. All the states have assented to it, all are alike bound by it and all are equally protected by it, even their power to lay and collect taxes, comprehensive and necessary as that power is, it cannot be extended in any way which involves discrimination against such commerce."

Likewise in this connection the following language of this Court becomes pertinent:

> "To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the republic was organized. When that equality disappears we may remain a free people, but the union will not be the union of the Constitution."
>
> Coyle v. Smith, 221 U. S. 559, 567, 580 (55 L. Ed. 853, 858, 863) (1910).

If the second clause of the Twenty-first Amendment authorizes a state to establish barriers to the importation of alcoholic beverages from other states solely for the purpose of augmenting the flow of beer from the enacting state into the territory of its sister states, and if, for the purpose of accomplishing such extraterritorial effect the enacting state can annex as a condition precedent to the right to import into its own borders any sort of a provision whatever, certainly, many disastrous results will ensue both to the harmonious relationship of the states of the Union and to the integrity of the Twenty-first Amendment itself.

For example, the four States of Kentucky, Pennsylvania, Illinois and Indiana, in the fiscal year 1937, produced about 86 per cent of all the whisky manufactured in the United States (U. S. Treas. Dept. Statistics on Distilled Spirits, fiscal year 1937, p. 7). If the right of the several states to attach any sort of a condition as a prerequisite to the admission of out-of-state liquor be unlimited, then these four states are placed in a position of serious embarrassment in respect not only to the distilling interests within said states, but in respect also to the freedom of these states as to their own state purchases of material and supplies, because Michigan or Missouri, whose manufacture of liquor is negligible, might prescribe that no spiritous beverages could be imported from any state unless that state, in its state purchases of fuel, road material, building material or other supplies gave preference to the materials and supplies manufactured in Michigan or Missouri.

As was well observed by Justice Cardozo in Baldwin v. Selig, 294 U. S. 511, 532, "The Constitution * * * was framed upon the theory that the peoples of the several states must sink or swim together and that in the long run prosperity and salvation are in union and not division."

The Michigan Act does not subserve the purpose of the Twenty-first Amendment, which undoubtedly was to enable the states to maintain their own policing regulations as to alcohol without disturbance through importation from other states. The object of the present legislation is to constrain and coerce the states to forego the advantages of the Twenty-first Amendment, and to enforce the free and uninterrupted flow of beer as an industrial commodity. This is apparent in the opinion of the three-judge court, and also in the propaganda published in support of the retaliatory type of legislation. We quote from an article in Brewery Age (Feb. Number, 1938, p. 8).

> "States which have discriminatory laws then will have but two alternatives: either to remove all discriminations or to have highly important outstate markets closed to them. They will, we are confident, take the former course, with the net result that ultimately beer will enjoy the same freedom in interstate commerce afforded to all other legitimate articles of commerce, a status that is to be highly desired for the good of the brewing industry as a whole."

Undoubtedly the commerce clause was intended to prevent retaliation by one state against the products of another moving in interstate commerce. This clause, of course, was adopted not only to secure the freedom of interstate commerce, but to preserve harmonious relations among the states. The second section of the Twenty-first Amendment was unquestionably enacted to enable a state to preserve its jurisdiction intact in respect to the regulation or the prohibition of liquor traffic **within its borders.** The objects of both these constitutional provisions are still public desiderata. The people of the United States are entitled to enjoy the benefits of both of these constitutional provisions. These provisions are susceptible of harmonious construction. Any apparent conflict may be reconciled so as to carry out all of these objects. They may be reconciled along the lines of a formula which will uphold the policing regulations of a state, though incidentally discriminating against the alcoholic products of other states, but will denounce legislation if the true object thereof is retaliation and not the policing of the traffic.

If such a formula cannot be written the Twenty-first Amendment becomes a sword to advance in other states the commercial interests of the liquor industry domiciled within the enacting state and ceases to be a shield to protect the states from interference in the administration of their domestic policies. The maintenance of the integrity of the Twenty-first Amendment, which is the latest utterance of the sovereign people, surely requires that a line of demarcation be defined which, on the one hand, will leave the states perfectly free to deal with their domestic problems of liquor control without interference by other states; and, on the other, will inhibit interference with interstate commerce by retaliatory legislation designed solely to thwart and not to secure the beneficent objects of the second section of the Twenty-first Amendment.

Certain further observations are warranted in respect to the assumptions by the trial court that the purpose of the challenged legislation is to protect the domestic market within Michigan for the breweries of that state contrary to the facts alleged in the bill and found to be true by the Court. The criterion established by the Act consisting in whether or not certain provisions exist in the laws of the manufacturing states, appears from the facts found by the Court and detailed in paragraph H set out in Exhibit III of the jurisdictional statement, to be wholly unrelated to the amount of beer shipped by any of the states involved into Michigan. Among the facts found by the Court are, that during the first nine calendar months of the year 1937 the amount of beer produced in other states and shipped into Michigan and there consumed was about 20 per cent of the total amount of beer consumed in the State of Michigan; that the States of Illinois, Missouri, Ohio and Wisconsin shipped two-thirds of this amount imported into Michigan during that period, but the laws of the States of Illinois, Ohio, Missouri and Wisconsin do not contain any of the provisions recited in the Michigan Act which would render their beer subject to exclusion from Michigan; that, moreover, as detailed in this portion of the bill and found to be true, the breweries of the four states just named are capable of producing and shipping into Michigan more beer than was produced in the State of Indiana and shipped into the State of Michigan. That during the first ten calendar months in the year 1937 there were imported into the State of Michigan but 145,250 barrels of beer produced in Indiana. Moreover, the statistics contained in said bill, and found to be true, showed that Illinois had sixty-two breweries compared to seventeen in Indiana, and that the sixty-two breweries in Illinois produced 4,059,423 barrels of beer, compared to about half that amount produced in Indiana, and that the figures of production in Ohio were also practically twice the amount of beer produced in Indiana, and that the State of Missouri likewise far exceeded the State of Indiana in production of beer. We repeat, therefore, that it was factually shown in the Court's finding that whether or not the laws of a particular state did or did not contain the provisions denounced in Section 40 of the Michigan Act as obnoxious was utterly without any relation to the amount of beer produced in such state and shipped into Michigan, and that, consequently, the only inference deducible from this factual situation is that the design of the law as applied to the actualities of the situation was to promote the sale of Michigan beer in out-of-state markets and not to preserve or protect the Michigan market for its domestic breweries.

The assumption of the Court to the contrary is utterly at variance to the findings of fact. This is also true of several other assumptions in the Court's opinion, which this Court, of course, is at liberty to review fully, since all the facts alleged in the bill are found to be true and will necessarily be before this Court upon appeal.

VII.

NO RULING PRECEDENTS FORECLOSING THE CONTROVERSY.

State Board of Equalization v. Young's Market Co., 299 U. S. 59 (1936), does not deal with retaliatory type of statute such as is here involved nor does this opinion in any sense pass upon the relative scope of the Twenty-first Amendment and the commerce clause.

The case of Mahoney v. Joseph Triner Corporation, No. 761, decided May 23, 1938, in this court, likewise expressly refrains from passing upon any questions arising under the commerce clause in relation to the Twenty-first Amendment, for the opinion expressly states: "The sole contention of Joseph Triner Corp. is that the statute violated is the equal protection clause."

Likewise, in the Mahoney case, the statute of Minnesota there involved was not of the retaliatory type.

In each of these cases the state law in question discriminated between the domestic products of the enacting state on the one hand and similar products of all the remaining states of the Union on the other. Neither of these cases supports the proposition that a state has the right, under the Twenty-first Amendment, absolutely to bar the products of some of its sister states from its domestic markets while permitting precisely the same kind of products of the rest of its sister states to enter such markets merely because it desires to punish the first-mentioned states for having local laws governing the liquor traffic within their respective borders which are not to its liking.

It is also apparent that the Court in the Mahoney case refused to consider the reasonableness of the challenged provision of the Minnesota Act, since the classification under all circumstances was between all out-of-state manufacturers as one class and all domestic manufacturers as the other, and, as held in the Young's Market case, this particular classification is expressly recognized in the Twenty-first Amendment.

It is fallacious to assume, as has the court below, that because conceivably any or all the states might enact statutes containing provisions prescribed by the Michigan Act, the classification consists of but two classes of manufacturers, those whose plants are within Michigan being one class, those outside another class. Actually at the moment of the enactment of this statute such was not the case. Practically, and in the light of human experience, this act creates a classification among outside manufacturers, and, therefore, is not the classification "recognized by the Twenty-first Amendment."

CONCLUSION.

We make two observations.

It is not reasonable that the object of amended section 40 is to preserve the Michigan market rather than to open up outside markets when its application is made to turn entirely upon the particular terms upon which a sister state may admit Michigan beer into the territory of such sister state.

It is likewise difficult to conceive of a retaliatory act being upheld under the Twenty-first Amendment by tacit acquiescence in the holding of an inferior court, when the validity of a retaliatory act has never been considered by this Court under this amendment.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 130

INDIANAPOLIS BREWING COMPANY, INC.,
Appellant,

vs.

THE LIQUOR CONTROL COMMISSION OF THE
STATE OF MICHIGAN ET AL.
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF MICHIGAN.

APPELLANT'S BRIEF.

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SUPREME COURT OF THE UNITED STATES

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No. 130

INDIANAPOLIS BREWING COMPANY, INC.,
Appellant,

vs.

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Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

APPELLANT'S BRIEF.

I.

Opinion of the Court.

The opinion of the Three-Judge District Court, convened pursuant to Section 380 of Title 28 of the United States Code Annotated (Judicial Code Section 266, as amended) for the Eastern District of Michigan, Southern Division, denying an interlocutory injunction and dismissing the appellant's bill of complaint as amended and supplemented, is reported in 21 Fed. Supp. 969 (In Equity No. 8269, R. 36).

II.

Statement of the Case.

On December 10, 1937, the appellant, a manufacturer of beer duly licensed to import into and sell in the State of Michigan, whose brewery was located within the State of Indiana, brought an action of injunction on its own behalf and as a class suit on behalf of all the manufacturers of beer similarly situated against the Liquor Control Commission of the State of Michigan, and against each of the individuals comprising the same as members of said Commission and individually, and against the Attorney General of the State, to enjoin the enforcement of Section 40 of Act No. 8 of the Public Acts of the State of Michigan of the Extra Session of 1933, 1934, page 18 (as amended by Act No. 281 of the Public and Local Acts of the Legislature of that State passed in the Regular Session of 1937, page 509), hereinafter called amended section 40, and also to enjoin the enforcement of a regulation of the Liquor Control Commission of that State dated December 14, 1937, which under the color of amended Section 40 designated the State of Indiana and certain other States as having laws declared discriminatory by amended Section 40. The appellant claimed in its bill as amended and supplemented that amended Section 40 and the regulation adopted pursuant thereto were repugnant to the Commerce Clause of the Federal Constitution in that the same imposed a burden upon interstate commerce not within the dispensation contained in the Commerce Clause and accorded to the states by the Second Section of the Twenty-first Amendment, and deprived the appellant and other manufacturers of beer, being persons in the appellant's class and also the customers of the appellant, of property, business, good-will, rights, immunities and privileges belonging to them without due process of law and denied them equal protection of the law, all exceeding any dispensation accorded to the State of Michigan by reason of the Twenty-first Amendment.

That portion of Section 40, namely the last paragraph thereof, which is material to an understanding of this cause, reads:

> "The commission shall forthwith adopt a regulation designating the states, the laws, or the rules or regulations of which are found to require a licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in this state; or which deny the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license; or which prohibit licensed wholesalers of beer therein from possessing or selling beer purchased in this state, unless the one from whom purchased has secured a license and paid a fee therein, when such seller neither transports the beer into said state nor sells the same therein; or which impose any higher taxes or inspection fees upon beer manufactured in this state when transporting into or sold therein, than is imposed upon beer manufactured and sold within said state, the regulation adopted shall prohibit all licensees from purchasing, receiving, possession, or selling any beer manufactured in any state therein designated, said regulation to become effective ninety days after its adoption. Any licensee or person adversely affected shall be entitled to review by certiorari to the proper court the question as to whether the commission has acted illegally or in excess of authority in making its findings with respect to any state."

(The full text of Section 40 and the title of the Act containing Section 40 are set out in Exhibit A.)

The regulation of the Liquor Control Commission of December 14, 1937 is as follows:

> "Pursuant to Act No. 8, Public Acts, Extra Session of the year 1933 of the State of Michigan, as amended

by Act No. 241 of the Public Act for the year 1935, and Act No. 281 of the Public Act for the year 1937, particularly Section 40 thereof, the Michigan Liquor Control Commission promulgates and adopts the following rule and regulation designating as discriminatory according to Section 40 of said Act the following States: MAINE, MARYLAND, NEVADA, INDIANA, NEW HAMPSHIRE, NORTH CAROLINA, PENNSYLVANIA, TENNESSEE, VERMONT, WASHINGTON. These designations are made after a careful examination of the laws and rules and regulations of the aforementioned states."

The court below denied the appellant's request for an interlocutory injunction and dismissed its bill as amended and supplemented (R. 41, 50).

A.

Appellant's Bill of Complaint as Amended and Supplemented.

Appellant's original bill of complaint was filed December 10, 1937 (R. 1), and was thereafter supplemented on December 27, 1937 (R. 21).

There were also filed in support of the bill asking for an interlocutory injunction certain affidavits of Carl Frey and Harold Feignter (R. 31), substantially identical with Clause H of amended bill of complaint quoted as to material matters hereafter in argument.

It is to be noted that by virtue of the specific finding of the court noted below the allegations of appellant's bill as amended and supplemented and the affidavits just mentioned, were found to be true and constitute the trial courts finding of facts.

Appellant, in its bill as amended and supplemented, charged the several matters above set forth under this statement of facts. More particularly, the bill charged that the appellant was an Indiana corporation and a citizen and resident of that State, duly licensed to import and sell beer in Michigan and that the defendants were charged, under the laws of Michigan, with the enforcement of the acts complained of and was vested with the sole power and duty to control the alcoholic malt traffic and administer the laws and statutes of the State of Michigan relating thereto and that each of the defendants is a citizen and a resident of that State ~~residing in~~ the District and Division where this suit is brought. (R. 1, 2, 3).

Appellant alleged and exhibited its license to do business within the State of Michigan and that its customary method of doing business in the latter State was to sell the beer of the appellant manufactured in Indiana on written telegraphic and telephonic orders from the appellant's customers licensed wholesalers and retailers in Michigan and pursuant to said orders to deliver to the customers' respective places in the latter State, the alcoholic malt beverages so manufactured by the appellant and purchased from it and that the approximate value of the appellant's business in each of the years 1935 and 1936 and the first ten months of 1937 was $40,000. (Clause 3, C and 4 of Bill, R. 4, 5).

Under the bill, jurisdiction of the court was predicated upon the diversity of citizenship and the fact that the controversy exceeded, exclusive of interest and cost, the sum of $3000 and that the proceeding was a suit of a civil nature in equity; jurisdiction was also invoked because of the alleged invalidity of Amended Section 40 and the regulation issued thereunder; the invalidity of said legislation and regulation was predicated on the violation of Section 8, of Article One (The Commerce Clause), the Fourteenth Amendment of the Constitution of the United States, Section 10 of Article One and Section 2 of Article Four of the Constitution of the United States and that the challenged Act was not within the dispensation accorded to the State of Michigan under the Second Clause of the Twenty-first Amendment. (R. 26, 27, 28, 29, 30, Clause G.)

The appellant charged that interstate commerce from Indiana into the State of Michigan was being unduly and unlawfully burdened by amended Section 40 and that appellant's established business and good-will was being taken without due process of law and that likewise the business and good-will of its patrons, the licensed wholesalers and retailers within the State of Michigan, were being taken without due process of law; and that by reason of the unreasonable and unconstitutional classification created by said amended Section 40 and the regulation thereunder the appellant, persons in the appellant's class and the said customers of the appellant were being denied the equal protection of the law (R. 29, 30, Clause G).

The appellant charged that the threat of the Commission to adopt and promulgate the regulation and to enforce Section 40 was intimidating and deterring appellant's customers and the customers of persons in the appellant's class from making further orders of appellant's goods and that it would also cause its customers loss and depreciation of the good-will and property which such customers had built up in handling the goods of the appellant and that all of said damage was incapable of measurement and would result in great, immediate and continuous loss.

The bill as amended and supplemented charged, particularly in Clause G, that the Act in question was not a lawful exercise of the sovereignty of the said State of Michigan and exceeded the power and authority of the State under the Twenty-first Amendment to the Constitution of the United States or by virtue of any permission or grant of power thereunder and that the classification thereby created was unjust, unreasonable, and arbitrary and without any discernible public object or relation to the control of the liquor traffic of the State of Michigan and charged that amended Section 40 constrained and hampered the State of Indiana and the other States of the Union in the enactment and enforcement of laws relating to their domestic policy in respect to the alcoholic traffic contrary to the constitutional relationship of the States.

The constitutional objections were set forth in great detail and particularly in Clause G of the bill as amended and supplemented.

The factual situation with reference to the importation of beer into the State of Michigan was set out with some detail in Clause H of the bill as amended and supplemented, as appears *infra* in the argument, at pages 30, 31, 32 and 33 of this brief.

As the court below necessarily adopted this statement of facts when it found that the allegations of the bill as amended and supplemented were true, we now summarize this portion of appellant's bill.

During the fiscal year ending June 30, 1937 the ten States designated in the Michigan regulations as having laws which resulted in the exclusion from Michigan of the alcoholic malt products of these States, had the number of breweries and manufactured the number of barrels of beer now set out;

State.	Number of Breweries.	Barrels.
Indiana	17	2,254,490
Maryland	12	1,338,893
Nevada	2	21,388
New Hampshire	1	58,824
North Carolina	1	82,293
Pennsylvania	109	6,614,907
Tennessee	3	155,952
Washington	17	915,391
Vermont	0	0

That certain States not designated in the regulation and which, consequently, did not have laws preventing the importation of their alcoholic malt products into the State of Michigan, had the number of breweries and manufactured the amount of beer respectively now set out;

State.	Number of Breweries.	Barrels.
Illinois	62	4,059,423
Kentucky	7	986,039
Missouri	20	3,442,809
New York	69	9,230,725
Ohio	55	4,281,448
Wisconsin	86	6,448,420

It is further charged that during the first nine calendar months of the year 1937 there were in all 603,241 barrels of beer produced outside of and imported into the State of Michigan and that during the first ten calendar months of said year only 145,250 barrels of beer in Indiana was shipped into Michigan and that substantially all of the 603,241 barrels of foreign beer imported into the State of Michigan, excepting that part just described as being imported from the State of Indiana, were produced and shipped from the States of Illinois, Missouri, Ohio, and Wisconsin which did not have laws resulting in the exclusion of their beer under said Section 40 and that the States of Maryland, Nevada, New Hampshire, North Carolina, Pennsylvania, Tennessee and Washington, designated in the regulation excluding the beer produced in said States, imported substantially no beer into the State of Michigan and that none whatever was imported into Michigan from the State of Vermont which was designated in the regulation.

That in the same period the amount of beer imported into the State of Michigan produced in other States of the Union than Michigan amounted to about 20 per cent of the total amount of beer consumed in Michigan and that Illinois, Missouri, Ohio and Wisconsin, not designated in the said regulation and which did not have laws obnoxious to the Michigan standards, *produced and imported into the State of Michigan in excess of two-thirds of the total amount imported into the State of Michigan during said period,* and that these States had breweries "capable of producing and importing into the State of Michigan far more beer in addition to that already being imported into the State of Michigan therefrom than was produced in the State of Indiana and shipped into the State of Michigan."

The bill further charged in Clause H:

> "That in truth and fact the type of liquor control statute described in said amended Section 40 herein complained of has no bearing or relation to the amount of beer produced in any of the said states and shipped into the State of Michigan and the fact whether or not laws of any of said states contain provisions which require or do not require the exclusion of beer produced therein under said Section 40 has no bearing upon or relation to the amount of beer produced therein and shipped into the State of Michigan (R. 32).

The accompanying affidavits supported the allegations of the Bill with substantially the same statistics.

B.

The Record of the Court's Finding of Facts.

The last sentence in the first paragraph of the opinion of the court below reads as follows: "No answer having been filed—the defendants moving to dismiss—we find the facts, so far as necessary to decision, as alleged in the bill and its accompanying affidavits" (R. 36).

Thereafter this appellant filed a written motion for more specific findings of facts (R. 42) and the court below entered the following order:

> "It appearing that there are no issues of fact presented since no answer has been filed and no evidence received, and since in our opinion heretofore filed we have made the general finding that we accept the facts as stated in the bill of complaint and amendments and the affidavits attached thereto, and have made therein such detailed findings as bear upon the legal and constitutional issues, and since our conclusions of law are with sufficient particularity set forth in the said opinion.
>
> "The petition for special finding of fact and conclusions of law is hereby denied" (R. 51).

Consequently, by the foregoing declaration of the trial court, the original bill of complaint as amended and supplemented and the affidavits accompanying the same were found to be true and became the court's finding of facts upon which its decision below was based.

No point was made by appellee as to any deficiency in substance in the Bill or in the proof offered in support thereof. The only issue is upon the constitutionality of the challenged Act:

Jurisdiction.

The jurisdiction of this Court to hear these appeals depends upon the Act of Congress of June 18, 1910, Chapt. 309, Sec. 17, 36 Stat. 557; March 3, 1911, Chapt. 231, Sec. 266, 36 Stat. 1162; March 4, 1913, Chapt. 160, 37 Stat. 1013; February 13, 1926, Chapt. 229, Sec. 1, 43 Stat. 936-938 (28 U. S. C. A., Sec. 380).

An order noting probable jurisdiction of these appeals was made by this Court October 10, 1938.

The appeal was duly taken within the required statutory period, the decree being entered on March 5, 1938, and the application for appeal presented on April 27, 1938, and the appeal papers duly lodged in this Court within the time duly enlarged by the court below.

No question is made by the appellees as to the jurisdiction of this Court except that the questions have been determined by the *Youngs Market* and *Joseph Triner* cases, which are distinguished in the argument *infra*.

Appellee's Motion to Dismiss.

Appellee moved to dismiss on substantially these grounds:

1. That Michigan had authority within the limits of the Twenty-first Amendment to enact amended Section 40, and the laws of Indiana brought that State properly within the designation required by the Act.

2. That the Twenty-first Amendment abrogated the right to import intoxicating liquors free.

3 and 4 respectively negatived the claim that Section 10 of Article I and Section 2 of Article IV of the Federal Constitution were violated.

5. That the Fourteenth Amendment was not violated; and that appellant was a foreign corporation not admitted to do business in Michigan and for that reason could not claim the benefit of the equal protection clause (R. pp. 33, 34, 35).

III.

Specification of Errors.

1. The court erred in dismissing appellant's bill of complaint.

2. The court erred in holding that the State of Michigan had the power under the Second Section of the Twenty-first Amendment to enact Amended Section 40 described in the Bill and to adopt, under the authority thereof, the regulation of the Liquor Control Commission of that State dated December 14, 1937.

3. The court erred in holding said Amended Section 40, and the said regulation not repugnant to the Commerce lause of the Federal Constitution, namely, Section 8 of Article I thereof.

4. The court erred in holding the challenged Act and regulation did not each violate the due process and equal protection clauses of the Federal Constitution.

5. The court erred in holding that the challenged Act and regulation did not deny to appellant the equal protection of the laws contrary to the Fourteenth Amendment.

6. The court erred in holding that the State of Michigan had power under the Twenty-first Amendment to enact the challenged Act without violating the equal protection and due process clauses of the Fourteenth Amendment.

7. The court erred in holding the Twenty-first Amendment of the Federal Constitution dispenses with the application and operation of the Commerce Clause and Fourteenth Amendment of the Federal Constitution in respect to the challenged Act notwithstanding its sole object is the promotion of the sale of beer produced in Michigan throughout other States by means of economic retaliation.

Summary of Argument.

The Second Section of the Twenty-first Amendment of the Constitution of the United States provides:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The challenged Michigan statute, Section 40 of Public Act No. 8 of the Public Acts of the Extra Session of the Michigan Legislature of 1933, as amended by Act No. 281 of the Public Acts of 1937 of that State, hereafter referred to as amended Section 40, requires the Liquor Control Commission of Michigan to adopt a regulation prohibiting all licensees of that State from purchasing, receiving, possessing or selling any beer manufactured in any State designated in the regulation; and any State must be designated in such regulation if the laws of such State contain one or more of the provisions described in the Act. The presence of one or absence of all these four provisions described in the Act becomes the criteria for the admission or exclusion of the beer manufactured in such State.

The challenged Act forbidding the importation of beer from States having certain laws can be upheld only if it falls within the dispensation accorded to the States by Section 2 of the Twenty-first Amendment, for otherwise it is clearly repugnant to both the Commerce Clause and the Fourteenth Amendment.

State Board of Equalization v. *Youngs Market Co. et al.* (1936), 299 U. S. 59, 62;
Mahoney v. *Joseph Triner Corporation*, — U. S. —, Vol. 82, Law Ed. Advance Opinions No 17, 961, 962;
Bowman v. *Chicago, etc., Railway Co.* (1888), 125 U. S. 465, 507;
Leisy v. *Harden* (1890), 135 U. S. 100, 109, 124;
In re Rahrer (1891), 140 U, S. 545, 559;
Rhodes v. *Iowa* (1898), 170 U. S. 412, 419, 423.

An analysis of the amended Section 40 of the Michigan Act discloses that it operates to exclude from Michigan beer manufactured in States which have taken advantage of the Second Section of the Twenty-first Amendment in order to channelize separately the streams of imported and domestic beer or to differentiate in the regulation of imported and domestic beer, declared proper under this Amendment by the decisions in the *Youngs Market* and *Joseph Triner* cases, *supra*.

Essentially the Michigan Act retaliates against any State making use of the dispensation of the Twenty-first Amendment and seeks by economic reprisal to coerce its sister States from having recourse to the Amendment.

That the Michigan Act is designed to coerce the States of the Union in the manner just described clearly appears from: (a) The criteria of exclusion described in the Act; (b) The facts found by the trial court; (c) The discussion in the opinion of the trial court; (d) The propaganda published in support of this type of legislation.

Plainly, this retaliatory type of legislation strikes directly at the integrity of the Twenty-first Amendment itself. The Amendment cannot be invoked to accomplish its own nullification. The words *"laws thereof"* appearing in this Amendment should not be held to include a law intended to inhibit the several States of the Union from having recourse to the advantages conferred upon them by the Amendment itself.

It plainly appears that while the immediate object of the Michigan Act is to constrain its sister States to abandon the enactment of statutes permitted under the Second Section of the Twenty-first Amendment the advantage thereby anticipated to flow to the State of Michigan is the augmentation of the stream of exported beer from that State. The Twenty-first Amendment, however, was not adopted for the purpose of promoting the export of beer from one State into another, nor to implement the constraint of a sister State by economic reprisal to admit into its territory a larger stream of foreign beer than such State would, with an eye single to its police interests, otherwise admit.

Certain controlling principles of constitutional construction become pertinent. Constitutional provisions will not be construed so as to defeat their purposes. Literalism should be avoided and an Amendment, even though couched in sweeping and apparently all embracing language, is to be construed with reference to the original provisions of the Constitution and not in such manner as will strike down unnecessarily pre-existing principles contained in the Constitution which it was not the intention of the people at the time of the Amendment wholly to abolish; and, likewise, a construction raising a conflict between parts of the Constitution is inadmissible when, by reasonable interpretation, the parts may be made to harmonize.

These principles cast upon the court the duty of reconciling the new constitutional amendment with both the commerce clause and the Fourteenth Amendment and so far as a function or necessity remains for the operation of the latter provisions, they should be held effective to such extent as is not incompatible with the objects intended to be accomplished by the Twenty-first Amendment and especially to the extent that such provisions may supplement it.

The adoption of the Twenty-first Amendment was not induced by any sentiment of dissatisfaction with the operation of the commerce clause or the Fourteenth Amendment in respect to the prevention of trade wars between the States and the economic self-aggrandizement of the States by commercial reprisal or retaliation. The so-called "anti-discrimination" bills, now being promoted by a concerted movement, of which the recent Michigan and Missouri statutes are types, have as their aim the practical nullification of the Second Section of the Twenty-first Amendment by coercing, through threats of economic reprisal, the legislatures of the several States to forego the exercise of the dispensation thereby accorded.

The commerce clause and the Fourteenth Amendment have still a legitimate scope to effectuate the salvation of these provisions of the Twenty-first Amendment, especially as there has been no express repeal of the commerce clause or the Fourteenth Amendment in respect to their application in the proper case.

The historic purposes of the commerce clause are three fold; to prevent petty annoyances to interstate traffic, to preserve the harmonious relationship between the States, and to prevent the erection of economic barriers. Occasion still remains for the exercise of the last two suggested functions of the commerce clause in respect to the interstate alcoholic traffic. Both these two historic purposes of the commerce clause as well as the provisions of the Twenty-first Amendment are national desiderata, and in the light thereof the new Amendment and the older provisions of the Constitution should be reconciled to carry out the purposes of the Constitution enumerated in its preamble, "* * * to form a more perfect Union, * * * insure domestic tranquillity, * * * promote the general welfare * * *" and in accordance with the traditional attitude of this Court which has many times resolutely set its face against tolerating economic barriers and trade wars between the States.

Gulf C. & S. F. R. Co. v. *Ellis,* 165 U. S. 150, 165;
Sioux Remedy Co. v. *Cope,* 235 U. S. 197, 201;
Baldwin v. *Seelig,* 294 U. S. 511;
Western Union Telegraph Co. v. *Kansas,* 216 U. S. 1, 27;
Brimmer v. *Rebman,* 138 U. S. 78, 82, 83;
Brown v. *Houston,* 114 U. S. 622, 630;
Darnell & Son v. *Memphis,* 208 U. S. 113;
Philadelphia etc., Mail Steamship Co. v. *Pennsylvania,* 122 U. S. 326, 341;
Foster-Fountain Packing Co. v. *Haydel,* 278 U. S. 1, 13;
Pennsylvania v. *West Virginia,* 262 U. S. 553, 593;
Coyle v. *Smith,* 221 U. S. 559, 567, 580;
Atchison, Topeka & Santa Fe R. Co. v. *Mathews* (1899), 174 U. S. 96, 105;
Cotting v. *Godard,* (1901) 183 U. S. 79, 112;

Connolly v. *Union Sewer Pipe Co.* (1902), 184 U. S. 540, 558, 560, 563;

Louis K. Liggett Co. v. *Baldridge* (1928), 278 U. S. 105, 113;

Colgate v. *Harvey*, 296 U. S. 404, 423;

McCormick & Co. v. *Brown*, 286 U. S. 131, 139, 141;

Mugler v. *Kansas*, 123 U. S. 623;

Mayflower Farms v. *Ten Eyck* (1936), 297 U. S. 266, 272, 273, 274.

The line of demarcation, plainly foreshadowed in the opinion of this Court rendered by the late Mr. Justice Cardozo in *Baldwin* v. *Seelig*, 294 U. S. 511, 523, and in many earlier precedents, is based upon the primary purpose of the legislation involved, whether essentially designed to protect the domestic policy from out-of-State interference or for the primary purpose of exploiting out-of-State markets through economic retaliation.

If the purpose or effect of the challenged legislation is to subvert the Twenty-first Amendment or if the classification made by the challenged legislation is inconsistent or in conflict with the classification made by the Twenty-first Amendment, both the commerce clause and the Fourteenth Amendment apply.

Not only is the classification of the Michigan Act subversive of the Twenty-first Amendment but it provides a classification that is not "recognized" under the *Youngs Market* and *Joseph Triner* cases by the Amendment, because the Amendment can not be presumed to contemplate its own nullification. Besides, the classification of the Michigan Act is, factually, essentially dissimilar to the classification in the California and Minnesota statutes held valid in the last mentioned cases.

If amended section 40 of the Michigan Act is subversive of the Twenty-first Amendment, then such legislation is "derogatory to that mutual comity and respect which ought to prevail between the state and Federal government", for it is a Federal constitutional amendment which the legislation of Michigan seeks to reduce to a state of "innocous desuetude" under the cases holding that although the power of a State is plenary to admit or refuse to admit foreign corporations to engage in intrastate business within its confines, nevertheless, a state may not use its characteristic powers to bring about an unconstitutional result.

If the legislation of Michigan seeks to obstruct the operation or impair the integrity of the Twenty-first Amendment, since the public welfare of a State cannot transcend the public welfare of the Nation, the legislation is without a discernible public object and violates the Fourteenth Amendment.

It has been held that the power of Congress over interstate commerce is subject to the provisions of the Fifth Amendment. Likewise the power of a State over interstate commerce must be subject to the provisions of the Fourteenth Amendment.

In addition to the rights of the appellant and those persons of its class, the appellant is entitled to assert successfully that its business is being destroyed through the infringement of the constitutional rights of its customers, the licensed wholesalers and retailers of the State of Michigan.

Pierce v. *The Society of Sisters of the Holy Names* (1925), 268 U. S. 510, 535, 536;
Terrace v. *Thompson* (1923), 263 U. S. 197;
Truax v. *Raich* (1915), 239 U. S. 33, 43;
Truax v. *Corrigan* (1921), 257 U. S. 312.

Since the appellant is duly licensed to engage in interstate commerce in alcoholic liquors under the laws of Michigan, it is, although a corporation of the State of Indiana, entitled to claim the equal protection of the laws while engaging in interstate commerce.

Kentucky Finance Corp v. *Paramount Auto Exch. Corp.* (1923), 262 U. S. 544;
Frost v. *Railroad Commission*, 271 U. S. 583, 593, 594;
Quaker City Cab Co. v. *Pennsylvania* (1928), 277 U. S. 389, 400;
Louisville v. *Cumberland T. & T. Co.* (1912), 224 U. S. 649;
Fletcher (Cyc. Corp.) (Perm. ed) Sec. 8422.

Since the appellant bases its suit challenging amended Section 40 and the regulation adopted thereunder upon the invalidity thereof under the Constitution of the United States, appellant was not obliged to resort to the administrative provisions of the Act or to the State courts in advance of the proceedings in the Federal court and the Federal court had jurisdiction to entertain the action without such resort first having been had.

Risty v. *Chicago, etc.* (1926), 270 U. S. 378, 388;
Turner, etc. v. *Chicago, M. & St. P. R. R. Co.* (1926), 271 U. S. 259, 262.

> "That appellant's business is a property right, and as such entitled to protection against state legislation in contravention of the Federal Constitution, is of course, clear." *Liggett Co.* v. *Baldridge* (*supra*).

Argument.

Amended Section 40 of the Michigan Act requires the Liquor Control Commission of Michigan to adopt a regulation prohibiting all licensees of that State from purchasing, receiving, possessing or selling any beer manufactured in any State designated in the regulation and that a State be designated in such regulation if the laws of such State contain one or more of the provisions declared obnoxious in the Michigan Act.

Pursuant to this Act the Liquor Control Commission of Michigan adopted on December 14, 1937, a regulation designating the States of Maine, Maryland, Nevada, Indiana, New Hampshire, North Carolina, Pennsylvania, Tennessee, Vermont and Washington as having laws described in amended Section 40.

The appellant's bill of complaint, filed December 10, 1937, charged that the Commission was intending to adopt the foregoing regulation and that the defendants as law enforcing officers of the State of Michigan were intending and threatening to enforce and carry the regulation and challenged Act into execution and that the appellant's business and the business of manufacturers in the appellant's class and of their customers, the licensed wholesalers and retailers of Michigan, were being visited with immediate and irreparable loss of business and good-will from the mere adoption as well as from the intended enforcement of the Act and regulation. After the adoption of the regulation on December 10th, a supplemental bill was filed on December 20th, and further amendments thereto were filed on December 27, 1937, reciting the intervening events and showing the actual adoption of the regulation and resulting and continuing damage to the good-will and business of the appellant and its customers.

There is no question that the interference with interstate shipment of beer in the manner provided in the challenged Act and regulation was originally prohibited both by the Commerce Clause and the Fourteenth Amendment.

State Board etc. v. *Youngs Market Co., supra;*
Bowman v. *Chicago, etc., Railway Co.* (1887), 125 U. S. 507;
Leisy v. *Harden* (1889), 125 U. S. 100, 109, 124;

In re Rahrer (1891), 140 U. S. 545, 559;
Rhodes v. *Iowa* (1898), 170 U. S. 412, 419, 423;
United States v. *Chicago, Milwaukee & St. P. & P. Railway Co.* (1930), 282 U. S. 311, 327, and cases cited;
Railroad Retirement Board v. *Alton Railroad Co.* (1934), 295 U. S. 330, 347.

There is no dispute in the present case that the challenged Act and the regulation thereunder must depend for their validity upon whatever dispensation may be accorded to the States from the operation of the Commerce Clause and the Fourteenth Amendment of the Federal Constitution by the provisions of the Second Clause of the Twenty-first Amendment, which reads as follows:

> "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Purpose of the Twenty-first Amendment.

The appellant insists that the dispensation accorded to the States by the Second Section of this Amendment can not be invoked to achieve objects which, in the light of the history of Congressional legislation and of the adoption of the Amendment, it was not intended to achieve, and, further, that the provisions of the Twenty-first Amendment can not be construed to uphold legislation which is subversive of the Amendment itself.

The appellant maintains that it is easily demonstrable, in the light of the history of national legislation and constitutional amendments on the subject of alcoholic beverages, as appears in authoritative precedents and documents, that it was not the purpose of the Second Section of the

Twenty-first Amendment to promote the *exportation* of alcoholic beverages from one State into another.

We first refer to the Congressional debate upon the proposed provisions of the Twenty-first Amendment. Senator Blaine, of Wisconsin, a member of the Judiciary Committee to which the resolution for the amendment of the Constitution had been referred, said:

> "First, however, we had what is known as the Wilson law. That law was treated in the case of Rhodes *v.* Iowa, 170 U. S. 412; but the Supreme Court in that case gave a restricted construction of the language used by Congress, and held that under the Wilson Act the interstate character attached to the liquor until it had actually been delivered to the consignee. * * *
> The Webb-Kenyon Act was interpreted by the Supreme Court of the United States in the case of Clark Distilling Company *v.* Western Maryland Railway, 242 U. S. 311. The language of the Webb-Kenyon Act was designed to give the states in effect power of regulation over intoxicating liquor from the time it actually entered the confines of the state; and the Supreme Court held that it was following the doctrine laid down in the case of Rhodes *v.* Iowa, and necessarily must follow that doctrine in order to sustain the decision it was making in the case of Clark against Maryland Railroad Company.
>
> "In the case of Clark against Maryland Railway Company there was a divided opinion. There has been a divided opinion in respect to the earlier cases, and that division of opinion seems to have come down to a very late day. So, to assure the so-called dry states against the importation of intoxicating liquor into those states, it is proposed to write permanently into the Constitution a prohibition along that line."

The purpose of Section Two is to restore to the States by Constitutional Amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States.

Senator Borah, in discussing the proposed language of the Twenty-first Amendment, declared:

> "Mr. President, I wanted to say that this question of the right of the States, *in the exercise of the police powers to control the liquor traffic within the States,* was fairly and squarely presented in many cases to the Supreme Court, always a portion of the court contending that the police power should be permitted to be exercised by the States to the full extent within the boundaries of the States. * * * The people had declared they wanted to be rid of this evil, or at least to control it their own way. These States were invaded, their laws broken, their officials corrupted, by the same influences which now plead for State's rights and local control. They did not at that time respect that right at all. They trampled upon it and scoffed at it. Therefore, if we are to have what we are now promised, local self government, State rights, the right of the people of the respective States to adopt and enjoy their own policies, we must have some other method, some other provision of the Constitution, than those which existed prior to the adoption of the Eighteenth Amendment." (Our italics above.)
>
> "All this was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed the able Senator from Arkansas has seen fit to recognize the justice and fairness to the States of incorporating it permanently in the Constitution of the United States." (Vol. 76, Congressional Record, p. 4172.)

Senator Robinson referred to the foregoing remark of Senator Borah, declaring:

> "The language of Section 2 is perfectly plain (Quoting same.) That leaves to the State the power of regulation; it places the moral force of the government of the United States behind the State in the enforcement of their laws; * * *. (Vol. 76, Congressional Record, p. 4225.)

The celebrated case, *Clark Distilling Company* v. *Western Maryland Railway*, 242 U. S. 311, 320, 324, construing the Webb-Kenyon Act, was expressly referred to in the remarks of Senator Blaine, quoted above.

We quote from the opinion of Chief Justice White, who delivered the opinion of the Court:

> "* * * there is no room for doubt that it (Webb-Kenyon Act) was enacted simply to extend that which was done by the Wilson Act, that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught."

The Webb-Kenyon Act and the decision of the Supreme Court of the United States construing that Act were thus conspicuously in the minds of the framers of the Amendment.

Both from the language of Chief Justice White and the historic fact that the Webb-Kenyon Act was passed in a period of increasing restraint of the alcoholic traffic, it is indisputable that the purpose of the Webb-Kenyon Act was not to promote the exportation of beer from one State into another or to implement one State in constraining another by economic pressure to alter or abandon the latter's system of domestic control. So far, therefore, as the Second Section of the Twenty-first Amendment may be imbued with the spirit of its legislative prototype it seems clear that the promotion of out of State sales of beer was not one of its purposes.

The Purpose of the Michigan Act.

However, the criteria of exclusion set up in the Michigan Act, the finding of facts by the court below and the published propaganda in support of this type of legislation, as well as the utter inaptness and unrelatedness of the Michigan Act to the establishment or enforcement of any domestic policy of that State, make obvious the purpose of this Act to constrain the sister States of Michigan through economic pressure to forego the dispensation accorded to them by the Twenty-first Amendment to enact statutes and regulations concerning the liquor traffic with an eye single to the police necessities of such States, to coerce such States to alter or abandon statutory provisions obnoxious to the Michigan Act, and to cause beer to flow into these States the same as any other commodity regardless of the provisions of the Twenty-first Amendment and thus to enable the sale of Michigan beer to be promoted throughout the States of the Union.

An analysis of the Act and examination of the factual situation and of the propaganda referred to, will in detail support this position of the appellant.

Analysis of the Michigan Act.

Amended Section 40 provides four standards, all based upon the presence or absence of the described statutory provisions in the State of the origin of the beer.

The first standard requires the exclusion of beer if the State of its origin is found:

> "to require a licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in this state;"

Consequently, if another State, on account of greater difficulty of policing the stream of foreign beer as compared to domestic beer, deems it necessary to impose an additional fee, however trivial the fee may be, upon the right to sell the foreign product, the sale in Michigan of beer produced in such State is doomed. Thus, so far as the first standard of exclusion operates, providing in effect that if the sister State combines in one person as a wholesaler the right to handle domestic beer and also foreign beer, it can not make one charge for the importing privilege and another for the domestic privilege, even though the charge for the importing privilege is far smaller than for the domestic privilege. In other words, the Legislature of Michigan says to the other States of the Union: "You must either make a single charge for both privileges or you must charge only for the privilege of handling domestic beer, otherwise your beer will be excluded from Michigan."

Thus Michigan insists that its sister States are not free to accord even equal treatment to domestic beer as compared to imported beer in any regulatory system providing for wholesalers with combined privileges except at the hazard of having their beer banned from Michigan. This provision is not aimed at any discrimination against Michigan beer but is in the nature of a pre-emptory order to the sister States to comply with the peculiar desires of the Legislature of Michigan which are in no sense related to the regulation of the liquor traffic within Michigan.

The second standard excludes beer originating in a State which denies:

> "the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license;"

This standard is even sterner, more inexorable and unrelated to the domestic policy of the State of Michigan than the first standard. This standard prohibits a sister State from channelizing, specifically held proper in the *Youngs Market* case, domestic beer and foreign beer in separate channels excepting at the hazard of having its local beer thereby automatically excluded from shipment into Michigan. This is a plain demand on certain sister States to alter their laws establishing their present system of police control to conform to the views of the Legislature of Michigan, because evidently the Legislature of Michigan considers that the sale of Michigan beer in such sister States would be promoted by the abolition of the separate systems for the sale of foreign and domestic beer. If the sister States refuse to comply, the Michigan Act automatically effects reprisal and retaliation.

It may be noted at the same time that the statute of Michigan leaves open to importation into Michigan "bootleg" beer from a prohibition State, so far does this Act depart from any concern about the domestic policy of the State.

It is by virtue of these first two standards of exclusion contained in the Michigan Act that the beer manufactured in Indiana is excluded under its terms.

The laws of Indiana do not exclude foreign beer but channelize separately to a modified degree the streams of foreign and domestic beer. An Indiana wholesaler with a Port of Entry permit may import out-of-State beer and sell the same throughout the 92 counties in the State but must pay an additional license fee of $1500 per annum over and above the license fee of $1000 which he pays as a wholesaler without the right of importation, and must give bond to pay withdrawal taxes upon the foreign beer sold in Indiana in the same amount as the withdrawal taxes paid by the Indiana brewer upon domestic beer sold in that State. The wholesaler without a Port of Entry permit may within his territory consisting of the county of his residence and adjoining counties sell domestic beer, and foreign beer only when purchased from a wholesaler with a Port of Entry permit.

The Indiana Act also provides that no alcoholic beverage shall be imported or transported into the State unless the same is at the time of the importation or transportation the absolute property of a permittee authorized to import.

Pertinent portions of the Indiana Alcoholic Beverages Act are hereafter set forth in Exhibit B.

This Act was pleaded by reference in the appellant's bill of complaint. However, as the legislation adopted by the Michigan Liquor Control Commission did not specify in what particulars the laws of Indiana required the designation of Indiana as a State having discriminatory legislation presumptively insisting upon each of the specifications of amended Section 40 as requiring the exclusion of Indiana beer, it is necessary also to analyze the third and fourth standards set up in the Michigan Act.

The third standard of exclusion appertains to beers from States;

> "which prohibit licensed wholesalers of beer therein from possessing or selling beer purchased in this state, unless the one from whom purchased has secured a license and paid a fee therein, when such seller neither transports the beer into said state nor sells the same therein;"

This standard in effect declares that if a State has what might be called the "master importer system", that is, the channelizing of beer importations in such a manner as to require responsibility for tax or the handling of such importations only by persons thus licensed regardless of whether they actually acquire property in the beer or not, the beer produced in such states can not be shipped into Michigan. Plainly, the Michigan Legislature, believing that the sale of Michigan beer in other States may be thereby augmented, has sought to constrain its sister States to forego forbidding within their territory any simplifying channelization of the importation which such sister States might consider well designed to police the stream of imported beer.

Clearly, how or through what channels imported beer may move into the State of Indiana has no bearing upon the policing of the domestic traffic in alcoholic beverages within the State of Michigan.

The fourth and last standard of exclusion under the Michigan Act forbids the importation into that state of beer produced in States;

> "which impose any higher taxes or inspection fees upon beer manufactured in this state when transported into or sold therein, than is imposed upon beer manufactured and sold within said state."

This operates to exclude from the State of Michigan beer produced in any State which seeks to impose a higher tax or inspection fee upon foreign beer than it imposes upon its own. Thus the differentiation in the treatment of foreign beer as compared with domestic beer by way of higher tax or inspection fee must be abandoned by any State if the economic pressure resulting from excluding its beer on account of the presence on its statute books of the obnoxious statutory provisions is to be avoided.

Appellant insists that each of the statutory provisions of the sister States of Michigan which under the Michigan Act requires the exclusion of beer produced in a State having any such provisions, are clearly within the dispensation accorded to the States under the Second Section of the Twenty-first Amendment as construed in *State Board of Equalization* v. *Youngs Market Co.*, 299 U. S. 59, 64.

Upon the face of the Michigan Act it will be seen that the criteria for exclusion have no relation to policing the domestic alcoholic traffic within the State of Michigan nor to the quantity or quality of beer being imported into the State. On the contrary the whole trend of the Act is to seek to liberalize the laws of the sister States of Michigan by means of economic pressure so that the flow of Michigan beer into such States may be thereby augmented.

Let us now compare the Michigan Act with the laws upheld in the *Youngs Market* and *Joseph Triner* cases. In the enactment of these laws the Legislatures of California and Minnesota determined that for the benefit of their respective citizenries certain regulations were necessary. These regulations were accordingly adopted without regard to the laws of any other State and were absolute and unconditional in their application. The Michigan Act is essentially different for the Legislature of Michigan did not determine that the importation of beer from Indiana or any other State was detrimental to its people and therefore should absolutely and unconditionally be prohibited. The Legislature of Michigan merely determined that such importations should be prohibited only if Indiana maintained certain statutory provisions for the regulation of the liquor traffic within its own borders. It seems obvious that the determination of whether the importation of Indiana beer into Michigan is beneficial or detrimental to its people can not be conditioned upon what may be the domestic laws of Indiana, for if the exclusion of Indiana beer promotes the welfare of the people of Michigan, such would be the case regardless of what kind of local laws Indiana might at the moment have in force.

The Court's Finding of Facts Showing the Purpose of the Michigan Act.

The factual situation as disclosed in the court's finding of facts reveal that the challenged Act is wholly unadapted and actually unrelated to controlling the total volume of beer flowing into the State of Michigan to the extent that the infirmity of the Act in this respect is not a mere lack of meticulous adjustment but results from the real design of this legislation, namely, the promotion of the exportation of Michigan beer.

In the court's finding of fact appears the following taken from Clause H of the appellant's bill of complaint as amended.

"In the ten states designated by the said State Liquor Control Commission in their said regulation of December 14, 1937, the number of licensed breweries and the amount of beer by them produced during the fiscal year ending June 30, 1937, are now set out in the following table, to-wit:

State.	Number of Breweries.	Barrels.
Indiana	17	2,254,490
Maryland	12	1,338,893
Nevada	2	21,388
New Hampshire	1	58,824
North Carolina	1	82,293
Pennsylvania	109	6,614,907
Tennessee	3	155,952
Washington	17	915,391
Vermont	0	0

That in the fiscal year ending June 30, 1937, beer was produced in respective states named below by the number of breweries and in the amounts now set out;

State.	Number of Breweries.	Barrels.
Illinois	62	4,059,423
Kentucky	7	986,039
Missouri	20	3,442,809
New York	69	9,230,725
Ohio	55	4,281,448
Wisconsin	86	6,448,420

That during the first nine calendar months in the calendar year 1937 there were in all 603,241 barrels of beer produced outside of and imported into the State of Michigan. During the first ten calendar months in the calendar year 1937 there were imported into the State of Michigan 145,250 barrels of beer produced in the State of Indiana. That substantially all of said 603,241 barrels of said beer imported into the State of Michigan during the said nine months excepting the portion imported from the State of Indiana, were produced and shipped from the States of Illinois, Missouri, Ohio and Wisconsin and substantially no part of said beer produced outside of the State of Michigan and imported into the State of Michigan for sale therein during the said period of nine months were produced or shipped from the states of Maryland, Nevada, New Hampshire, North Carolina, Pennsylvania, Tennessee, and Washington and none whatsoever from the State of Vermont. And that during the same period the amount of beer imported into the State of Michigan which was produced in other states of the Union than Michigan amounted to bout twenty per cent of the total amount of beer consumed in the State of Michigan. That in the four states of Illinois, Missouri, Ohio and Wisconsin, which, as above alleged, produced and imported into the State of Michigan in excess of two-thirds of the total amount of beer imported into the State of Michigan during said period, are located the number of breweries as above set out which are capable of producing and importing into the State of Michigan far more beer in addition to that already being imported into the State of Michigan therefrom than was produced in the State of Indiana and shipped into the State of Michigan.

"That in the said regulation adopted by said Liquor Control Commission of the State of Michigan on December 14, 1937, the states of Illinois, Missouri, Ohio and Wisconsin are not designated as states having laws containing the provisions which require under said legislation of the State of Michigan the exclusion of beer produced therein.

"That in fact the laws of the states which are not designated in the said regulation of the Liquor Control Commission of the State of Michigan do not contain provisions requiring the exclusion of beer produced therein under the said legislation of the State of Michigan.

"That in truth and fact the type of liquor control statute described in said amended Section 40 herein complained of has no bearing or relation to the amount of beer produced in any of the said states and shipped

> into the State of Michigan and the fact whether or not laws of any of said states contain provisions which require or do not require the exclusion of beer produced therein under said Section 40 has no bearing upon or relation to the amount of beer produced therein and shipped into the State of Michigan and the said standards prescribed in said statute of the State of Michigan for the admission or exclusion of beer produced in other states according to the provisions of the laws of other states have no bearing or relation in fact to the amount of beer made in any state and shipped therefrom into the State of Michigan or any bearing or relation to the control of liquor traffic in the State of Michigan."

From the findings of fact it is clear that the Act was not directed at the States shipping the major portion of beer into Michigan, namely, Missouri, Illinois, Wisconsin and Ohio, although these States have also the plant facilities to increase the volume of their beer imported into Michigan so as to take up any slack caused by the displacement of the smaller volume from States which fall within the doom of the Act.

Besides, it can be easily observed that if the Michigan Act accomplished its real purpose, namely, to secure the repeal of obnoxious provisions now contained in the laws of other States, the beer from such other States would flow without interruption into Michigan and the total volume of beer being imported into Michigan would not be reduced by a single barrel.

This view of the purpose of the Michigan Act is confirmed by the propaganda put forward in support of the retaliatory type of legislation. We quote from an article in Brewery Age (Feb. Number, 1938, p. 8):

> "States which have discriminatory laws then will have but two alternatives; either to remove all discriminations or to have highly important outstate

> markets closed to them. They will, we are confident, take the former course, with the net result that ultimately beer will enjoy the same freedom in interstate commerce afforded to all other legitimate articles of commerce, a status that is to be highly desired for the good of the brewing industry as a whole."

It is well to bear in mind that the "discriminatory" laws referred to in this article are laws similar to the laws of California and Minnesota which have been upheld in the *Youngs Market* and *Joseph Triner* cases. That such is the purpose of the Michigan Act is at least reflected in the opinion of the trial court below when it declares that, "* * * It is not an unreasonable classification to discriminate against out State products in respect to their source when the laws of the State or origin create the evils sought to be remedied * * *", while this purpose is boldly proclaimed by the decision of the three-judge court in the Western District of Missouri, *Joseph S. Finch & Co. et al.* v. *McKittrick et al.*, 23 Fed. Supp. 244, 248, No. 252, now pending on the present term docket of this Court. The language of the trial court in the latter case runs;

> "Who will deny that at least it can be argued with a show of reason that the Missouri statute will tend to induce Indiana, and Pennsylvania and Massachusetts and Michigan to remove the barrier they have put up to shut out the products of the Missouri brewers and distillers (as well as like products from other states)?"

What both these courts have overlooked is the simple truth that if such be the object of the Michigan and Missouri statutes there can be no doubt in respect to the disintegrating effect of this legislation upon the integrity of the Twenty-first Amendment itself and that only an application of the Commerce Clause and the Fourteenth Amendment can prevent the subversion of the Second Section of the Twenty-first Amendment.

The Michigan Act is Subversive of the Second Section of the Twenty-first Amendment.

Both the immediate object and the ulterior thrusts of the Michigan Act reach into a sister State for the purpose of coercing the legislature of that State through economic retaliation to liberalize its provisions governing the admission of beer from the State of Michigan with the anticipated result that the sale of the Michigan beer therein would be augmented.

Since the passage of this legislation no sister State of Michigan can "Lift its hand freely in the sunshine as before, without the sense of that which it forebore", namely, freedom to prescribe its own domestic policy in respect to the local alcoholic traffic solely from the standpoint of its police necessities, unhampered by fear of reprisal or retaliation against the export of its breweries. Since the passage of this Act a State may not enjoy the dispensation accorded to it under the Twenty-first Amendment to enact any suitable system of differentiating for police purposes in the treatment of the streams of local and foreign beer without incurring the loss to its alcoholic industries of foreign markets, for the very reason that such State has taken advantage of the provisions of the Twenty-first Amendment.

The situation is analogous to that produced by legislation heretofore denounced by this Court which required of a foreign corporation as a condition precedent to its admission to do intrastate business that such corporation forego resort to the Federal courts. Undeniably legislation of the type represented by the Michigan and Missouri laws renders it more difficult and embarrassing for a State to avail itself of the dispensation accorded it by the Twenty-first Amendment. If such be the case the exercise of the legislative functions which have become permissible under the Second Section of the Twenty-first Amendment will be more and more abandoned and to that extent the beneficent object of the Amendment will be defeated.

Can the Twenty-first Amendment be Construed to Sustain Statutes Which Tend to Defeat Its Purpose.

Precedents abound which declare the principles which control the decision of this question. In *Prigg* v. *Pennsylvania*, 41 U. S. (16 Pet.) 345, 395, 10 L. Ed. 1060, 1089, Mr. Justice Story speaking for the court said:

> "No court of justice can be authorized so to construe any clause of the Constitution as to defeat its obvious ends, when another construction equally accordant with the words and sense thereof, will enforce and protect them."

In *Jarrolt* v. *Moberly*, 103 U. S. 580, it is said:

> "A constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it was aimed."

In *Laderburg* v. *Miller* (C. C. A. 4), 210 Fed. 614, 616, the court said:

> "The principle is elementary that a construction which would result in making a legislative enactment self-destructive or of no practical value will be rejected when there is a reasonable construction which would result in carrying out the manifest design of the statute; and, in applying this rule, that which is necessarily implied, as well as that which is expressed, must be regarded a part of the enactment. * * * Under this rule the Constitution of Virginia cannot be construed to contemplate the annulment of one of its own provisions by allowing a failing debtor to trans-

> mute a shifting stock of merchandise not exempt into exempt property by withdrawing it from sale for the purpose of claiming it as an exemption."

In re Dowling, 219 N. Y. 44, 113 N. E. 545, 548, the Court of Appeals, with Mr. Justice Cardozo concurring, declared:

> "In the construction of a statutory or constitutional provision a meaning should not be given to words that will defeat the purpose and intent of the statutory provision or that will make such provision absurd."

The familiar rule is declared in *United States* v. *Freeman,* 3 How. 556, 11 L. Ed. 724:

> "A thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers."

A law though formally enacted which must rest for its validity on the Second Section of the Twenty-first Amendment can not be deemed to fall within the category of "laws" referred to in the Amendment, if the purpose and effect of law is to bring the Amendment into disrepute and disregard. To countenance such a statute is in effect to hold that the Amendment contains within itself the seeds of its own destruction and that in fact it was written in the contemplation of and even to facilitate its own annulment.

Moreover, the situation involved in this appeal, although somewhat unique, is not wholly without analogy as intimated above to statutes requiring that a foreign corporation forego a Federal right, such as resort to a Federal court, as a condition precedent to domestication.

Originally it was held *Paul* v. *Virginia,* 8 Wall, 168, 181, that a State having power to exclude foreign corporations from its limits may admit them upon such terms and conditions as the State may think proper to impose. Later in *Home Ins. Co.* v. *Morse,* 20 Wall. 445, 456, the sweeping language in *Paul* v. *Virginia* was limited to the particular facts of that case and it was held that this language could not be extended to include conditions repugnant to the Constitution and laws of the United States. Subsequently, in *Southern P. Co.* v. *Denton,* 146 U. S. 202, 207, a Texas statute requiring a foreign corporation desiring to be domesticated in that State to agree that it would not remove any suit from a court of the State into the Federal court, was held unconstitutional and it was there declared:

> "But that statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the state, to surrender a right and privilege secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions."

~~This~~ doctrine was for a while repudiated by the Supreme Court of the United States, *Security Mut. L. Ins. Co.* v. *Prewitt,* purporting to follow the case of *Doyle* v. *Continental Ins. Co.,* 94 U. S. 535.

However *Terral* v. *Burke Constr. Co.,* 257 U. S. 529, 533, overruled the *Prewitt* and *Doyle* cases and approved the minority views of Mr. Justice Bradley enunciated in the *Doyle* case, pp. 543, 544, where Justice Bradley said:

> "Though a state may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so. Total prohibition may produce suffering, and may manifest a spirit of unfriendliness towards sister states; but prohibition except upon conditions derogatory to the jurisdiction and sovereignty of the United States, is mis-

> chievous, and productive of hostility and disloyalty to the general government. If a state is unwise enough to legislate the one, it has no constitutional power to legislate the other. * * *
>
> "The whole thing, however free from intentional disloyalty, is derogatory to that mutual comity and respect which ought to prevail between the state and general governments, and ought to meet the condemnation of the courts whenever brought within their proper cognizance."

In *Frost* v. *Railroad Commission,* 271 U. S. 583, 594, 595, 596, 597, 598, 599, the minority views expressed in the *Doyle* case were followed in an opinion reviewing the whole subject, where it is remarked (p. 598):

> "And the principle, that a state is without power to impose an unconstitutional requirement as a condition for granting the privilege, is broader than the application thus far made of it."

and again at p. 599:

> "The states can not use their most characteristic powers to reach unconstitutional results."

The Classification of the Michigan Act is Not the Classification "Recognized" by the Second Section of the Twenty-first Amendment.

There are three reasons supporting the view that the classification of beer (with the resulting classification of manufacturers and wholesalers of beer) hinging upon the fact that another State has enacted laws making use of the dispensation accorded by the Twenty-first Amendment cannot be a classification "recognized" by the Amendment. The first of these grounds relates to the point that we have just been discussing, namely, that the purpose and effect of the Michigan Act operates as a nullification through economic reprisal of the Second Section of the Twenty-first

Amendment. If indeed a classification resting on the circumstance that a State had taken advantage of the Amendment is a classification recognized thereby, then the Amendment must have been written in contemplation of and in order to facilitate its own destruction. This is unthinkable.

A second ground is obvious in that the classification of the Michigan Act is not factually the classification of the California or Minnesota statutes held in the *Youngs Market* and *Joseph Triner* cases to be classifications "recognized" by the Amendment. The California classification embraced all wholesalers of beer importing beer as one class, and all wholesalers handling domestic beer as another class, while the Minnesota statute created a classification consisting of all liquor processed within the State in contrast to all liquor processed without the State. The Michigan Act creates a classification consisting of manufacturers or wholesalers of domestic beer and wholesalers of foreign beer made in States whose laws do not offend the Michigan standards and the wholesalers of foreign beer originating in States the laws of which are obnoxious to Michigan standards. Lastly, there is the further ground that in the light of the history of congressional and constitutional regulations by the Nation of interstate traffic in alcoholic beverages no purpose has ever been disclosed therein to promote or foster out State sales of beer.

For these reasons the classification made by the Michigan Act does not coincide with any classification automatically made by the Twenty-first Amendment itself.

Legislation of the Retaliatory Type Falls Within the Scope of the Commerce Clause and the Fourteenth Amendment.

It seems upon principle that if the Michigan Act is subversive of the Second Clause of the Twenty-first Amendment or if the classification created by the Act is not a classification "recognized" by the Amendment or is in conflict therewith, then the Amendment can not be held to render the legislation immune from operation of the Commerce Clause and the Fourteenth Amendment. This follows because otherwise, as in the instant case, the Second Clause of the Twenty-first Amendment would become a sword to strike down domestic legislation of the several States made possible by the Twenty-first Amendment and would no longer operate as a shield to protect such legislation.

The laws considered in the *Youngs Market* and *Joseph Triner* cases were not laws designed to hamper resort to the Twenty-first Amendment but were laws the reasonableness or unreasonableness of which and the application of which to interstate commerce automatically resulted from the very nature of the provisions of the Second Section of the Twenty-first Amendment. But this new species of classification of the retaliatory type being clearly not within the intent of the classification made in the Twenty-first Amendment must run the gauntlet of both the commerce clause and the Fourteenth Amendment. There is not contained in the Twenty-first Amendment any express repeal of either the commerce clause or the Fourteenth Amendment. It follows that we have here the usual problem of determining to what extent a subsequent constitutional amendment has altered or modified pre-existing provisions. The controlling principles have long since been well settled. Mr. Justice Butler, speaking for a majority of the court in *U. S.* v. *Lefkowitz*, 285 U. S. 452, 467, said:

> "And this Court has always construed the provisions of the Constitution having regard to the principles upon which it was established. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions."

Said Mr. Justice Holmes in the majority opinion in *Gompers* v. *United States*, 233 U. S. 604, 609:

> "But the provisions of the constitution are not mathematical formulas having their essence in form, they are organic, living institutions transplanted from English soil, Their significance is vital, not formal; it is to be gathered not simply by taking the words in a dictionary, but by considering their origin and the line of their growth."

Again in *Baine Peanut Co.* v. *Pinson,* 282 U. S. 499, 501:

> "The interpretation of constitutional principles must not be too literal.".

In *Eisner* v. *Macomber* (1919), 252 U. S. 189, 205, 206, this Court had occasion to construe the Sixteenth Amendment of the Constitution authorizing a Federal income tax from the standpoint of the taxability of a stock dividend; and in that connection to consider the bearing upon the new amendment of certain pre-existing provisions in the Constitution requiring apportionment according to population for direct taxes upon real or personal property. The court there said:

> "A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property real and personal."

The more recent case of *Evans* v. *Gore* (1920), 253 U. S. 245, 259, is a clear instance of the discriminating construction applied by this Court to the new amendment from the standpoint of its relation to pre-existing provisions of the Constitution, and Mr. Justice Van Devanter, speaking for the Court, said:

> "Preliminarily we observe that, unless there be some real conflict between the Sixteenth Amendment and the

prohibition in Article III, Sec. 1, making the compensation of the judges undiminishable, effect must be given to the latter as well as to the former; and also that a purpose to depart from or imperil a constitutional principle so widely esteemed and so vital to our system of government as the independence of the judiciary is not lightly to be assumed."

In *Marbury* v. *Madison*, 1 Cranch. 137 (2 Law Ed 60), this Court declared:

> "A construction which raises a conflict between parts of the constitution is inadmissible when by any reasonable interpretation they may be made to harmonize."

In *Popovici* v. *Agler*, 280 U. S. 379, 383, 384, the broad language of Article III Section 4 of the Federal Constitution:

> "The Judicial Power shall extend * * * to all Cases affecting Ambassadors, other public Ministers and Consuls,"

and further providing:

> "In all Cases affecting Ambassadors, other public Ministers and Consuls * * * the Supreme Court shall have original jurisdiction,"

was construed so as not to include a divorce proceeding against a foreign consul. In speaking for the court Mr. Justice Holmes in this case observed:

> "The language, so far as it affects the present case, is pretty sweeping, but, like all language, it has to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used."

and further:

> "If when the Constitution was adopted the common understanding was that the domestic relations of hus-

> band and wife and parent and child were matters reserved to the states, there is no difficulty in construing the instrument accordingly, and not much in dealing with the statutes."

Literally the language of the Twenty-first Amendment is not more comprehensive than the language of the Sixteenth Amendment or the language of Article II Section 3 of the Constitution, the one referring to "income from whatever sources derived" and the other referring to "all suits."

In *Fiske* v. *State of Missouri* (1933), 62 F. (2d) 150, 154 (C. C. A. 8th), the Court said:

> "The Amendment does not stand alone, and no construction of its meaning based upon such hypothesis can be sound. It is only a part of the Constitution, and must be construed as such. Like all instruments, the Constitution is subject to the rational rule of construction that the parts must be understood in relation to each other and to the entirety in order to preserve the fu[illegible]st vitality of the whole instrument in all of its parts. 'It cannot be presumed that any clause in the Constitution is intended to be without effect * * * unless the words require it.' Marbury *v.* Madison, 1 Cranch 137, 174, 2 L. ed. 60; Prout *v.* Starr, 188 U. S. 537, 543, 23 S. Ct. 398, 47 L. Ed. 584. Therefore, when some particular clause, in its bare wording, seems to destroy or limit or qualify some other clause, it is the office of the Court to examine the involved parts in the light of the entire instrument with a view to preserving such extent of each as can harmoniously live together. Such rule has been applied to this Amendment."

In re opinion of the Justices (Mass. 1933), 197 N. E. 99, the court said:

> "Articles 48 and 64 of the Amendments are equally parts of the Constitution. They stand on the same footing. They are to be construed and interpreted in combination with each other and all other parts of the Con-

> stitution as forming a single harmonious instrument for the government of the Commonwealth. Tax Commissioner *v.* Putnam, 227 Mass. 522, 524, 116 N. E. 904, L. R. A. 1917F, 806; Opinion of the Justices (Mass.), 196 N. E. 260."

The Constitutional provision against diminishing the salaries or emoluments of judges during their term, while of immeasurable importance to the stability of our form of government, is not paramount to the provisions of the Fourteenth Amendment safeguarding against State action the life, liberty and property of individuals through insistence upon due process of law and equal protection of the law; or to the provisions of the commerce clause in so far as they apply to instances where States have sought through reprisal or retaliation industrial self-aggrandizement at the expense of their sister States wholly apart from regulations of a police character.

Indeed it is hard to see in what respect the power of the State over interstate commerce in intoxicating beverages, except where the Twenty-first Amendment has expressly or by inevitable implication otherwise provided, can be exempt from the provisions of the Fourteenth Amendment when the power of Congress itself over interstate commerce generally is subject to the limits of the Fifth Amendment as declared in *United States* v. *Chicago, M. & St. P. Railway Co.,* 282 U. S. 311, 327 and cases there cited and in *Railroad Retirement Board* v. *Alton Railroad Co.,* 295 U. S. 330, 347. Of course, so far as the State law falls within the classification made by the Twenty-first Amendment or is not subversive of that Amendment, the commerce clause yields to the Amendment. However, the extent of the dispensation from the provisions of the Commerce Clause is delimited by the necessity which may remain for employing the commerce clause to prevent the frustration of the Second Section of the Twenty-first Amendment. At the time of the adoption of the latter Amendment there was no desire on the part of the people of the United States to abate the rigors of the commerce clause inhibiting the erection of economic barriers between States and there was no disposition on the part of the framers of the Amendment to disturb the harmonious relationship of the States which had been fostered by the provisions of the commerce clause as construed by the Supreme Court of the United States. In the debates in Congress over the adoption of the Amendment and in the discussions in the several State conventions ratifying the Amendment there appears no hint of dissatisfaction with the provisions of the commerce clause insofar as this clause operated to prevent trade wars or reprisal between State and State. It was not in an atmosphere of discontent with this aspect of the commerce clause that the Twenty-first Amendment was written. Likewise, it is certain that there was no intention on the part of the people of the United States to dispense with provisions of the commerce clause or of the Fourteenth Amendment in so far as such provisions would be required to render effective the Second Section of the Twenty-first Amendment. In other words it is scarcely tenable to maintain that the historic purpose of the commerce clause to prevent trade wars between the States and thus to promote an harmonious union or the fundamental provisions of the Fourteenth Amendment requiring statutes to have discernible public objects, reasonable classification and reasonable relation to their purposes have been abandoned in respect to purely economic aspects of the liquor industry, when so to hold would convert the Second Section of the Twenty-first Amendment into an engine of self destruction.

This type of legislation which seeks to wreck local laws of the police type producing only incidental discrimination, has oddly enough been dubbed an "anti-discrimination" measure. Most of these retaliatory measures promoted in concert have appeared in a stereotyped form, the so-called "anti-discrimination" bill, introduced in 1937 in the Legislatures of California (Ass. Bill 2794); Connecticut (S. B. 667); Illinois (S. B. 221); Iowa (S. B. 267); Nebraska (S. B. 315); and Missouri (House Bill 331); but enacted only in the standardized form in Missouri and in a modified form in Michigan (amended Section 40 herein challenged), the pertinent portions of the Missouri Act being set out in Exhibit C of this brief.

The Missouri Act prescribes eight separate standards of exclusion, each based upon a specifically described provision, which, if included in the law of a sister State, necessarily effects the exclusion of both beer or whiskey originating in that State, and adds a ninth general standard of exclusion which outlaws the beer or liquor produced in any State if the laws of that State contain any "prohibitions, restrictions or conditions" which would place the alcoholic liquor manufactured in Missouri "at a disadvantage in competition with the same kind of alcoholic liquor manufactured in such State." The challenged Michigan Act embraces but four of the standards of the Missouri Act and was evidently derived therefrom. Pennsylvania, following the passage of the Missouri and Michigan Acts, enacted a statute imposing the same restrictions and prohibitions on beer from a foreign State that such State imposes on beer from Pennsylvania (Pa. Law 1937, No. 372, Section 29, passed June 16, 1937).

Alabama enacted an anti-discrimination statute in general terms without any specific definitions of discrimination (Alabama General Acts, Extra Session 1937, No. 66, Section 63). (Also see a general discussion of the nature and purpose of these Acts and of the constitutional aspects thereof in Columbia Law Review Magazine, Vol. XXXVIII, No. 4, 1938, pp. 644, 669).

Ostensibly all these Acts were enacted to protect the "home market" but actually these Acts are legislation in disguise enacted for the sole purpose of bringing economic pressure upon the legislatures of sister States to constrain them to abandon the purely police type of legislation so as to permit out-of-State beer to move into their borders without being thus hampered. The propaganda which has been put forward in support of this so-called anti-discrimination bill is quite outspoken as appears in the article in Brewery Age (Feb. Number, 1938, p. 8) quoted above.

Thus it will be seen that the conscious and proclaimed purpose of this retaliatory legislation is to emasculate the Second Section of the Twenty-first Amendment and enable beer to flow freely in the channels of interstate commerce in spite of its provisions. This type of legislation makes use of trade wars and reprisals forbidden by the Commerce Clause in order effectually to annul the Twenty-first Amendment on the theory that the Twenty-first Amendment has done away with every species of restraint even against purely economic warfare contained in the Commerce Clause or the Fourteenth Amendment.

Neither the court in its opinion in this cause below, 21 Fed. Supp. 2969, nor the three-judge court in the Western District of Missouri, No. 130, disclaims the progress of this purely economic warfare. Indeed, these opinions acknowledge that this state of trade warfare now exists. This acknowledgment is premised in the opinion of the three-judge court in the present appeal and is fully acknowledged in the opinion of the Missouri three-judge court where it is declared:

> "The Missouri statute discriminates against Indiana manufacturers in favor of those in Georgia because Indiana discriminates against Missouri manufacturers and Georgia does not. The discrimination is certainly bottomed on reason, not a price. It is bottomed on the same reason as supports those national laws which effectuate the raising and lowering of our tariffs against goods imported from foreign countries as they raise

and lower their tariffs against American manufactured goods."

Of course, we cannot fully foresee to what length this economic warfare is likely to proceed if the Second Section of the Twenty-First Amendment permits a State to annex as a condition precedent to the importation of liquor into its boundaries any terms it pleases no matter to what extent such terms require that constitutional rights be abandoned and the harmony that prevails among the States disturbed. We can, however, cite a likely instance of what will occur. The four States of Kentucky, Pennsylvania, Illinois and Indiana in the fiscal year of 1937 produced 86 per cent of all the whiskey manufactured in the United States according to the United States Treasury Department statistics on distilled spirits, p. 7 (fiscal year 1937). This industry, therefore, substantially allocated to these four States only, is completely at the mercy of their sister States, not as regards the exclusion of their liquors for police purposes, but as regards economic constraint in other respects. Any State is free under the theory of the "anti-discrimination" acts to say that liquor may not be shipped into its borders from any State unless the government of that State purchases all of its road and other public materials and supplies from the enacting State. Thus Missouri can say to Michigan or Pennsylvania, "You may ship no liquor into this state unless preference is given to the products of Michigan manufacturers, building materials or other supplies purchased by you as a state."

It is our contention that this chaotic condition results from a perversion of the purpose of the Second Section of the Twenty-first Amendment and that in order to prevent the obvious disastrous consequences ensuing therefrom that a line of demarcation should be drawn with respect to reconciling the commerce clause and the Fourteenth Amendment with the Twenty-first Amendment so as to preserve a proper scope for the commerce clause and the Fourteenth Amendment, where needed to sustain and reinforce the Twenty-first Amendment, and even, as we shall presently see, to maintain the primary purposes of the Constitution as a whole.

In *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 596, the opinion of the court, speaking of the Commerce Clause, runs:

> "The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws, and to insure uniformity in regulation. It means that in the matter of interstate commerce we are a single nation, —one and the same people. All the states have assented to it, all are alike bound by it, and all are equally protected by it. Even their power to lay and collect taxes, comprehensive and necessary as that power is, cannot be extended in a way which involves a discrimination against such commerce."

Likewise in this connection the following language of this Court becomes pertinent:

> "To this we may add that the constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution."
>
> *Coyle* v. *Smith* (1911), 221 U. S. 559, 567, 580 (55 L. Ed. 853, 858, 863).

In *Wisconsin* v. *Michigan* (1935), 295 U. S. 455, 461, 462, this Court in a boundary dispute where the boundary ran through a channel declared:

> "The doctrine of the thalweg is a modification of the more ancient principle which required equal division of territory and was adopted in order to preserve to

> each State equality of right in the beneficial uses of the boundary streams as a means of navigation. Minnesota *v.* Wisconsin, 252 U. S. 273, 282, 64 L. Ed. 558, 564, 40 S. Ct. 313."
>
> "* * * The rule that the States stand on an equal level or plane under our constitutional system (Wyoming *v.* Colorado, 259 U. S. 419, 465, 470, 66 L. Ed. 999, 1013, 1015, 42 S. Ct. 552) makes in favor of that construction of the boundary provisions under consideration. Ct. Connecticut *v.* Massachusetts, 282 U. S. 660, 670, 75 L. Ed. 602, 607, 51 S. Ct. 286."

Certainly it can not be argued that it is the intent of the Twenty-first Amendment to encroach upon the objects of the Constitution itself as numerated in its preamble, "* * * to form a more perfect Union, * * * insure domestic tranquillity, * * * promote the general welfare * * *". Certainly the American people have not abated their devotion to these original purposes. The preamble of the Constitution itself seems to impel the reconciliation of the Amendment with the original provisions of the Constitution and to preserve the functions of the commerce clause and the Fourteenth Amendment so far as is requisite to enable the purposes described in the preamble of the Constitution to be effected.

In *Baldwin* v. *Seelig,* 292 U. S. 511, 522, 523, the late Mr. Justice Cardozo, speaking for the Court, very happily declared:

> "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

This remark followed a discussion by the Court of the same type of arguments that have been invoked in the minds of the trial courts below dealing with the Michigan and Missouri Acts and predicating a remote connection with the police power upon deductions based upon advancing the prosperity of a State at the expense of its neighbors. In this same opinion the court covered the history of commercial rivalries between the States, their unfortunate results, and also indicated the line of demarcation which may be applied in order on the one hand to protect the police functions of a State free of outside interference under the terms of the Second Section of the Twenty-first Amendment and on the other hand to prevent that Amendment from degenerating into a mere weapon of offense in the conduct of trade wars between the States. We quote further from this opinion:

> "Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the Commerce Clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.' Farrand, Records of the Federal Convention, vol. II, p. 308; vol. III pp. 478, 547, 548; the Federalist, No. XLII; Curtis, History of the Constitution, vol. 1 p. 502; Story on the Constitution, Sec. 259. If New York in order to promote the economic welfare of her farmers may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.
>
> "The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to be served is the

> maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income. Nebbia *v.* New York, 291 U. S. 5032, 78 L. Ed. 940, 54 S. Ct. 505, 89 A. L. R. 1469, *supra.* Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity, * * *".

It will be noted that the line of demarcation follows the determination of the primary purpose of the legislation. If the primary purpose of the legislation is to visit sister States with reprisal and retaliation in order to constrain a change in their laws and promote the export of intoxicating beverages, plainly such legislation transcends the dispensation accorded to the States from the commerce clause and the Fourteenth Amendment. If, on the other hand, the primary purpose of the legislation is a regulation of the domestic traffic and protection against the local policy of the State through interference from beyond its borders, such legislation falls within the dispensation of the Amendment even though there be incidental discrimination against the alcoholic products of other States or even though the alcoholic products of other States be entirely barred.

The Fourteenth Amendment is also applicable for the protection of the business and property of the appellant, if the classification turning entirely on the provisions of the laws of other States, is not a classification, as pointed out above, which is recognized by the Twenty-first Amendment or if the classification can be deemed as being based upon the fact that a given State is availing itself of the dispensation of the Amendment, because such latter classification would logically be based upon the nullification of the Amendment. A State law making such classifications would be repugnant to both the equal and due process clauses, because the classification would have no substantial relationship to the accomplishment of a legitimate end.

If the view be sound that the challenged Act has a subversive effect upon the integrity of the Twenty-first Amendment itself, can such an Act have a discernible public object? Is it conceivable that there can be a public welfare of the people of Michigan in conflict with the public welfare of the people of the United States? Can it advance the public welfare of the Nation if a State enact legislation which professedly is intended to bring a Federal constitutional amendment into "innocous desuetude"? Can a State constitutionally reward one who violates the law of a sister State or a law of the United States? Instantly such a contention would be met with the principle that such a law would be without a discernible public object. It must be remembered that the Twenty-first Amendment is a Federal constitutional amendment. This circumstance brings the case plainly within the principles laid down by Mr. Justice Bradley quoted above and especially within his observation, "The States cannot use their most characteristic powers to reach unconstitutional results," and his further observation, "The whole thing, however free from intentional disloyalty, is derogatory to that mutual comity and respect which ought to prevail between the State and general government, and ought to meet the condemnation of the courts whenever brought within their proper cognizance."

In *Panhandle Eastern Pipe Line Co.* v. *State Highway Commissioners,* 294 U. S. 613, 622, referring to the police power of a State, it is said:

> "The police power of a state, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the state to protect its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire."

In *Treigle* v. *Acme Homestead Assoc.* (1936), 297 U. S. 189, 196, Mr. Justice Roberts, speaking for the Court, said:

> "Such an interference with the right of contract can not be justified by saying that in the public interest the operations of building associations may be controlled and regulated, or that in the same interest their charters may be amended. The statute merely attempts, for no discernible public purpose, the abrogation of contracts between members and the association lawful when made. This cannot be done under the guise of amending the charter powers of the corporation. Compare Bedford *v.* Eastern Bldg. & L. Asso., 181 U. S. 227, 45 L. Ed. 834, 21 S. Ct. 597."

and again, in the same case:

> "Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights can not inhibit the proper exertion of the power, it must be exercised for an end which is in fact public,

and the means adopted must be reasonable adapted to the accomplishment of that end and must not be arbitrary or oppressive."

Jay Burns Baking Co. v. *Brien,* 264 U. S. 504;
Weaver v. *Palmer Bros. Co.,* 27 U. S. 402.

If the objects of the Michigan statute are those which we have described or if it has a subversive effect upon the Amendment involved, the police power of that state has been exercised for an end which is in fact not public and the act falls, under the cases cited above in this argument and in the summary of argument, within the prohibitions of the Fourteenth Amendment.

Of course, the plaintiff, a corporation duly licensed to sell intoxicating liquors in the course of interstate commerce by the State of Michigan, is a "person" within the meaning of the due process and equal protection clauses of the Fourteenth Amendment and can not be subjected to the State statutes in conflict with the Federal Constitution.

Liggett Co. v. *Baldridge,* 278 U. S. 105, 111.

We have noted in the summary above cases sustaining the proposition that the appellant can assert its damage through the violation of the constitutional rights of its customers and thus successfully assail the challenged law; and further that it was not necessary for the appellant to resort to any administrative proceedings provided by the laws of Michigan or to the relief afforded by the State courts since the contention of the appellant is based on the absolute nullity of the Michigan statute.

Opinions of the Trial Courts Passing on the Michigan and Missouri Acts.

Although in addition to general and specific statements charging the violation of the commerce clause and the Fourteenth Amendment by the challenged Michigan Act, the appellant, in clause G of the amended bill, asserted that the challenged Act exceeded any permission to that State accorded by the Second Section of the Twenty-first Amendment, the three-judge court in the present appeal paid scant heed to the commerce clause, erroneously assuming that the *Youngs Market* case had disposed of the appellant's contention in respect thereto, and wholly ignored the contentions of the appellant with reference to the Second Section of the Twenty-first Amendment with the mantle of its protection over the retaliatory type of legislation. Likewise, although in Clause G (4) of the bill it was asserted that the Michigan Act was retaliatory, extra-territorial in its operation and effect, and intended to constrain and hamper the States of the Union in the enactment and enforcement of laws relating to their domestic policy contrary to the constitutional relationship of the States and the new Amendment, these contentions were entirely ignored in the opinion of the court below. The court however did logically base its opinion upon the premise that the economic pressure exerted by the Michigan Act was within the dispensation of the Twenty-first Amendment because the court declared that Michigan had,

> "Power to regulate its own industry and control its own market to the extent that its industries were elsewhere excluded and to the extent that such exclusion threatens their economic stability",
> * * * "to discriminate against out state products in respect to their source when the laws of the state of origin create the evils to be remedied. * * *".

These expressions of the court's opinion disclose its rational. It clearly holds that the law of a sister State legitimate under the Twenty-first Amendment can yet be regarded as creating an evil which Michigan may cure by conditioning the admission of the beer produced in such

State into Michigan upon the contingency that such state repeal its laws. Clearly the underlying premise in such reasoning is that a State has been supplied with a weapon of offense, an instrumentality of retaliation, designed to constrain a sister State to undo what it has done by virtue of the Twenty-first Amendment. This opinion proceeds on the further premise that what is done by a State legitimately by virtue of the Twenty-first Amendment may yet produce what a sister State may substantially declare an evil susceptible of correction by the exertion of the police power of the latter State to erect an economic barrier so as to compel its sister State to forego availing itself of the Second Section of the Twenty-first Amendment.

What the court below overlooked was the disintegrating effect of such a holding upon the integrity of the Twenty-first Amendment itself and that the commerce clause and the Fourteenth Amendment are in such a case necessary to prevent the frustration of the new Amendment.

The court based its justification of economic pressure upon a misinterpretation and misapplication of the decision in *Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412. Of course in the latter case this Court did hold it proper for the State of Louisiana in levying a chain store tax to take into consideration the number of stores the taxpaying chain had in other States as well as in Louisiana, but clearly not to exert any pressure upon the legislatures of the sister States or to affect the business of such a company conducted in other States, but only for the purpose of measuring the economic power and advantage of such company capable of being exerted in the State of Louisiana on account of its power and wealth wherever located.

The decision of the United States District Court for the Western District of Missouri in *Joseph S. Finch & Co. et al.* v. *McKittrick et al.,* 23 Fed. Supp. 244, upholding the legislation of Missouri (Laws of Missouri 1937, p. 536), containing provisions similar to the Michigan Act, likewise erroneously assumes that the *Youngs Market* case disposes of any question of the application of the Commerce Clause to that relation and apparently does not concern itself with the detrimental effect of this relation upon the legitimate use of the Twenty-first Amendment itself.

The discussion of the court in Missouri case is confined to the equal protection clause of the Fourteenth Amendment, and when analyzed is found to be confined to the propriety of the classification created by the Act, which is similar in that respect to the Michigan Act. However, the court in the *Missouri* case concedes that the object of the Act is to "promote the interest of Missouri brewers and distillers engaged in an important industry." The court erroneously assumes that object is accomplished by shutting off some competition from the Missouri field, although it is plain that if the law had its desired effect, namely, to induce other States to remove those provisions from their statutes which are obnoxious to the Missouri law, no competition from other States would be cut off in any degree whatsoever. But the court lays emphasis on the fact that the real method for obtaining the advantage sought by the Missouri legislation is "by offering an inducement to other States to withdraw products of this Missouri industry. * * *" The court then attempts the deduction as it were by saying that the legislation benefits the brewer and from him the benefits go out to the people of the State at large, but expressly admits that there is discrimination against certain States to secure the economic advantage of Missouri.

Appellant insists that these decisions are not only erroneous in their conclusions and reasoning but quite beside the points herein chiefly urged and distinctly raised in the bill below.

In closing this argument we may observe in the first place that it is apparent that we have in the present appeal a case distinct from the *Youngs Market* and *Joseph Triner* cases and one which presents an entirely different problem to this Court. There was no suggestion in the *Youngs Market* and *Joseph Triner* cases of any hostility in the California and Minnesota Acts toward the spirit and operation of the Twenty-first Amendment. These acts were not conceived in a spirit of seeking to inhibit the employment of the Twenty-first Amendment by the several States. Besides, the classification made by the Michigan Act is essentially dissimilar to the classification made by the California and Minnesota Acts. Neither did these Acts seek to exert any pressure or constraint upon the legislatures of the sister States.

But in the present case it is equally apparent that there is a concerted movement in progress because the enactment of the so-called "anti-discrimination" legislation is for the avowed purpose of constraining the several States to forego resorting to the dispensation accorded them by the Twenty-first Amendment. Let it be remembered that the word "anti-discrimination" is applied to the type of legislation represented by both the Michigan and Missouri Acts and is thus professedly antagonistic to legislation recognized as constitutionally valid by the *Youngs Market* and *Joseph Triner* cases.

Can there be a more complete demonstration of the real objective sought by this legislation? And strange to say it is the allegedly unqualified dispensation from the commerce clause and the Fourteenth Amendment accorded by the Twenty-first Amendment that is invoked to secure its practical nullification.

Paradoxical as it may appear, State powers under this theory of the new Amendment have been amplified in respect to the previous restraints of the commerce clause only to result in the immediate inhibition of the amplified powers of the States by the constraint which one State may under this Amendment exert upon another through economic retaliation to forego its use.

The philosophy underlying the so-called "anti-discrimination" bills professes to respect the powers of the States only for the purpose of rendering them in fact impotent and on the other hand professes an attachment for the Twenty-first Amendment only for the purpose of rendering it futile. Clearly the ideal of the Twenty-first Amendment to enable local liquor legislation to be patterned in a provincial mold is not inconsistent with the American ideal that countenances no commercial retaliation between the States. The Twenty-first Amendment is susceptible of a construction which will reconcile both the centripetal and centrifugal forces latent therein, which otherwise threatens to disrupt the harmonious relations between the States.

If the Amendment be viewed merely as an effort by constitutional Amendment to return to Chief Justice Taney's views in the *License Cases*, 5 How. (46 U. S.) 504, 586, and restore to the States the same police power over imported articles between the moment of their arrival even in original packages and the moment of their ultimate destination that a State enjoys after the latter point, certainly such police powers would be subject both to the Fourteenth Amendment and the inhibitions of the commerce clause against mere retaliation. It is not necessary, however, to sustain the views of the appellant that this view be taken by this Court, especially on account of the fact that the challenged legislation is a subtle species of assault upon the new amendment itself.

If the benign purposes of the preamble of the Constitution are still to prevail the situation is one which emphaticully calls for the traditional judicial statesmanship of this Court.

Respectfully submitted,

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EXHIBIT A.

Amended Section 40 of the Michigan Act (Act No. 281, Public Acts of 1937, p. 509).

Said amended title is as follows:

"An act to create a liquor control commission for the control of the alcoholic beverage traffic within the state of Michigan, and to prescribe its powers, duties and limitations; to provide for the control of the alcoholic liquor traffic within the state of Michigan and the establishment of state liquor stores; to provide for the incorporation of farmer cooperative wineries and the granting of certain rights and privileges thereto; to provide for the licensing and taxation thereof, and the disposition of the moneys received under this act; to provide for the enforcement and to prescribe penalties for violations of this act; to provide for the confiscation and disposition of property seized under the provisions of this act; to provide a referendum in certain cases; and to repeal certain acts and parts of acts, general, local and special, and certain ordinances and parts of ordinances."

and said amended section 40 reads as follows:

"Sec. 40. Beer; taxation and discrimination. There shall be levied and collected by the commission on all beer manufactured and/or sold in this state a tax at the rate of one dollar and twenty-five cents per barrel if sold in bulk, and in like ratio if sold in smaller quantities, the payment of which shall be evidenced by excise tax beer stamps, caps, lids, or crowns as prescribed by the Michigan liquor control commission, affixed to the barrel, keg, case, or other container, as the case may be by the brewer if manufactured in this state, unless otherwise provided by the commission with respect to beer manufactured within this state, or by the wholesaler or the person from whom purchased if manufactured outside this state, whichever shall be designated by the commission, before sale thereof within this state by said wholesaler: Provided, however, That the tax imposed by this act upon beer manufactured in or imported into this state shall be rebated to such manufacturer or wholesaler upon satisfactory proof being furnished to the commission by affidavit or otherwise, as the commission may determine, that such beer was shipped out of the state for sale and consumption outside the state of Michigan.

"For purposes of taxation a barrel shall be construed to contain thirty-one gallons.

"Any manufacturer duly licensed as aforesaid and who has paid said license fee shall be exempt from payment of any tax imposed under the provisions of act number one hundred of the public acts of nineteen hundred thirty-one or amendments thereto, commonly known as the malt tax act, for all malt products taxed by said act used in its manufacturing process.

"The commission shall forthwith adopt a regulation designating the states, the laws, or the rules or regulations of which are found to require a licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in this state; or which deny the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license; or which prohibit licensed wholesalers of beer therein from possessing or selling beer purchased in this state, unless the one from whom purchased has secured a license and paid a fee therein, when such seller neither transports the beer into said state nor sells the same therein; or which impose any higher taxes or inspection fees upon beer manufactured in this state when transporting into or sold therein, than is imposed upon beer manufactured and sold within said state, the regulation adopted shall prohibit all licensees from purchasing, receiving, possessing, or selling any beer manufactured in any state therein designated, said regulation to become effective ninety days after its adoption. Any licensee or person adversely affected shall be entitled to review by certiorari to the proper court the question as to whether the commission has acted illegally or in excess of authority in making its finding with respect to any state."

EXHIBIT B.

(Pertinent Portions of the Indiana Alcoholic Beverages Act of 1935 With Amendments of 1937)—(Chapter 226, Acts 1935, Chapter 197, Acts 1937, Burns Revised Statutes, 1933, Supp. Sections 12-508, 12-801, 12-901.)

"Sec. 9. Beer wholesaler's permits may be issued as hereinafter provided. * * * Such wholesaler may exercise all of said permissions, both in the county of the residence of such wholesaler, and if such wholesaler be a corporation or a partnership, in the county wherein the principal office, as named in the application for such permit, is located, and may also exercise the privileges permitted under such permits in any adjoining county; Provided, however, Such wholesaler may store and keep on hand such alcoholic malt beverages only in the county of such residence and/or in the county in which such principal office is located."

"* * * Such wholesaler's permit, however, shall not be issued unless and until there be paid by said wholesaler to said administrator a separate license fee therefor of one thousand dollars ($1,000) in cash and there also be filed with the application for a permit a surety bond in the penal sum of two thousand dollars ($2,000) payable to the State of Indiana, to be approved by the commission, conditioned * * *"

"* * * After November 15, 1935, any person holding a permit to wholesale alcoholic malt beverages under this act may by complying with the terms and conditions hereinafter prescribed, apply for and may be granted by the commission, an additional permit to be known as a "port of entry permit," which shall, when granted, authorize such wholesaler so applying, to import into the State of Indiana, alcoholic malt beverages which have been manufactured outside of the State of Indiana, and to transport, possess sell and deliver, such imported alcoholic malt beverages within any county in the State of Indiana, but he may store and keep such imported malt beverages only in the county in which he is authorized to store and keep alcoholic malt beverages under his wholesaler's permit. Such importation, transportation, possession, sale and delivery shall be subject to the rules and regulations of the commission and subject to the same restrictions provided in this act, for persons holding permits to manufacture within the State of Indiana. No holder of a wholesaler's permit shall be qualified for such said additional permit who is disqualified to hold a wholesaler's permit. No such additional permit to import alcoholic malt beverages, however, shall be issued to any wholesaler, unless and until such wholesaler shall have paid a separate additional annual license fee in the sum of Fifteen hundred dollars ($1,500) to said administrator and shall have made such a showing as the commission shall require with reference to the ownership and residence and/or ownership of the business and/or stock of such corporation, and, unless and until said wholesaler shall have filed an additional surety bond in the penal sum of ten thousand dollars ($10,000), conditioned that he will not violate any of the provisions of any law of this state, touching the alcoholic traffic or the manufacture, importation, transportation or possession or sale or delivery of alcoholic malt beverages as defined in this act and/or of the rules and regulations of the commission applicable thereto, and that he will account for and pay over all license fees levied under this act, on the products imported and sold or withdrawn for sale by him under such permit, provided that the sum of one hundred dollars ($100), and no more, may be recovered in any one action on said bond, by the State of Indiana against such wholesaler, for the violation of a rule or regulation of the commission or for the violation of any of the provisions of this act (violations prior to action instituted to be deemed one continuing violation), but the full amount of any and all said taxes and license fees due and owing may be recovered by the State of Indiana in any action on said bond. No action or actions shall be brought upon said bond, except by the State of Indiana, and for the use and benefit of the State of Indiana. A beer wholesaler's permit and/or said additional permit as a "port of entry permit" granted to such wholesaler shall continue for one (1) year only, including the day of issue, and, thereafter, such permit or permits may be issued to the same prior holder thereof or to another applicant therefor, but only in the same manner and upon the same terms and conditions above specified and upon the payment of said special license fees. Not fewer than ten or more than one hundred port of entry permits shall be granted by the commission."

"Sec. 40. (a) Alcoholic Malt Beverage License Fees (gallonage). Any authorized manufacturer and/or importing agent, and/or wholesaler invested with the importing privileges (as to imported alcoholic malt beverages), and/or the holder of a dining car permit or of a boat permit, shall pay unto the State of Indiana a license fee of three and one-third (3⅓) cents on each gallon of alcoholic malt beverages manufactured or given or sold or withdrawn for sale or gift by him in the State of Indiana, which license fee shall be paid on the first and fifteenth day of each month, on all such beverages so manufactured or sold or given away or withdrawn for sale or gift by him during the preceding half-monthly period. * * *"

"Sec. 41. Miscellaneous Provisions. (a) No alcoholic beverage shall be imported or transported into the State of Indiana unless such beverage is at the time of importation or transportation thereof into the State of Indiana the absolute property of a permittee who is authorized under this act to import and/or transport the same into the State of Indiana, * * *"

EXHIBIT C.

Anti-discrimination Act of Missouri (Laws of Missouri, 1937).

"Section 1, Subsection (7). The phrase "discriminatory laws" means the laws of any state, or the rules or regulations of any administrative officer, commission or body thereof, which

(a) impose any tax, impost, or license fee upon the right to transport or import into such state any alcoholic liquor manufactured in this state; or

(b) prohibit the importation, transportation, or sale of any alcoholic liquor manufactured in this State unless the manufacturer obtains a license or pays a tax or fee when such manufacturer neither imports nor transports such liquor into said state nor sells the same therein; or

(c) prohibit or restrict any licensee in said state from purchasing, or from importing or transporting into said state, alcoholic liquor for the purpose of sale at wholesale therein from any manufacturer or wholesaler in this state, if such licensee may lawfully purchase the same kind of alcoholic liquor for the purpose of resale at wholesale therein from a manufacturer in said state without such restrictions or prohibition; or

(d) impose any different warehousing requirements or higher warehousing fees or inspection fees upon any alcoholic liquor manufactured in this State and imported or transported into such state than is imposed upon the same kind of alcoholic liquor manufactured in such state; or

(e) prohibit any manufacturer or wholesaler in this State or the agents or representatives of either from exercising the privilege of soliciting orders for the sale of alcoholic liquor manufactured in this State to any licensed wholesaler in said State, if the sale is to be made outside thereof, or to any retailer if such orders are to be filled therein by or through a licensed wholesaler in said State, if licensed manufacturers or wholesalers of the same kind of alcoholic liquor in said State or the agents or representatives of either are authorized to solicit orders for the sale of such alcoholic liquor manufactured in said State to licensed wholesalers or retailers; or requires manufacturers or wholesalers in this State, or the agents or representatives of either, to secure a license or pay a fee for said privilege, if no additional license or further fee is required of licensed manufacturers or wholesalers in said State for the privilege of soliciting orders from wholesalers or retailers; or impose upon a manufacturer or wholesaler in this State, or upon the agents or representatives of either, a higher fee for the privilege of soliciting orders for the sale of alcoholic liquors manufactured in this State than is imposed upon any person therein for the sole privilege of soliciting orders for the sale of the same kind of alcoholic liquor manufactured in said state; or

(f) impose any higher fees or taxes upon alcoholic liquor manufactured in this state when imported, transported, or sold therein than is imposed upon the same kind of alcoholic liquor manufactured and sold within said state; ~~or~~

(g) impose any higher fee for the privilege of selling or handling any alcoholic liquor manufactured in this state than is imposed for the privilege of handling or selling the same kind of alcoholic liquor manufactured within said state; or

(h) impose any prohibition against or limitations, restrictions, or conditions upon the purchase, sale, or solicitation of orders for the sale of alcoholic liquor manufactured within this state, or upon any person purchasing, soliciting orders for the sale, or selling the same that is not imposed upon the same kind of alcoholic liquor manufactured within such state, or upon persons purchasing, selling, or soliciting orders for the sale of the same; or

(i) impose, directly or indirectly, any other prohibition, restrictions or condition, upon the receipt, possession, disposition, or transportation of alcoholic liquor manufactured in this state, which is not equally imposed upon the same kind of alcoholic liquor manufactured in said state, and in such manner as to place the alcoholic liquor manufactured in this state at a disadvantage in competition therein with the same kind of alcoholic liquor manufactured in said state. * * * ”

“SECTION 1, SUBSECTION (8). The phrase “state in which discrimination exists” means any state of the United States as to which the Attorney General finds and certifies, as herein provided, that discriminatory laws exist, and so long as the certificate remains effective any state so certified by him shall be a “state in which discrimination exists.”

"Section 4. The transportation or importation into this state, or the purchase, sale, receipt, or possession herein, by any licensee, of any alcoholic liquor manufactured in a "state in which discrimination exists" is hereby prohibited, and it shall be unlawful for any licensee to transport or import into this state, or to purchase, receive, possess, or sell in this state, any alcoholic liquor manufactured in any "state in which discrimination exists" as herein defined. * * *"

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CHARLES ELMORE CROPLEY

CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 130

INDIANAPOLIS BREWING COMPANY, INC.,
Appellant,

vs.

THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN ET AL.,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

APPELLANT'S REPLY BRIEF.

HARRIS W. WIENNER,
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MCHALE, ARTHUR & MYERS,
Indianapolis, Indiana;
HERBERT J. PATRICK,
Indianapolis, Indiana;
THOMAS F. O'MARA,
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SUPREME COURT OF THE UNITED STATES

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THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN ET AL.,
Appellee.

APPELLANT'S REPLY BRIEF.

I.

Concessions of the Appellee.

1. As to the statement of the record:

Appellee concedes that appellant has accurately stated the record, appellee's brief, p. 3.

However, appellee has correctly supplemented the appellant's statement of facts in respect to the formal admission of the appellant as a foreign corporation to do *intrastate* business within the State of Michigan, the only license issued to the appellant being a license under the law of the State of Michigan to import, sell and deliver beer to licensed wholesalers and retailers within Michigan, which appellant contends renders it a person within the jurisdiction of Michigan in respect to the business covered by such license.

2. As to the basis of jurisdiction:

Appellee concedes that appellant has correctly stated the grounds of jurisdiction, appellee's brief, p. 2.

But as appellee has stressed by exclusive mention "diversity of citizenship" as a ground of jurisdiction, appellee's brief, p. 16, appellant now refers to appellant's bill, clause 5, R. 5, and also to appellant's brief, p. 5, where it appears that the bill also expressly predicates jurisdiction upon the Federal questions involved.

3. Appellee expressly concedes that the questions in this appeal are not moot, appellee's brief, p. 3.

II.

Summary of Certain Contentions of Appellant.

It is the contention of the appellant that the word "laws" in the Amendment contains the implied exception of statutes enacted with due formalities but which nullify or tend to nullify the Amendment itself; and it is also the contention of the appellant that the word "laws" referred to in the Amendment, stands subject to the same inhibitions in respect to the alcoholic traffic as any other statute would stand, save only when to recognize any such inhibitions would be to defeat the purpose of the Amendment. It is the further contention of the appellant that to the extent at least that the commerce clause of the Constitution is needed to uphold or support the Twenty-first Amendment, the commerce clause retains its full vigor for that purpose. It is also the contention of the appellant that in so far as a State statute may be primarily retaliatory, though incidentally regulatory, it does not fall within the category of "laws" covered by the dispensation of the Amendment for the reason not only that the people of the country did not at the time of the adoption of the Twenty-first Amendment contemplate the promotion of retaliation or any corresponding modification of the commerce clause, but because this very retaliation, based upon the act of a State taking advantage of the Twenty-first Amendment, strikes directly at the vitality of the Amendment itself. Clearly in this sense the commerce clause is needed to prevent the breaking down of the Twenty-first Amendment.

Moreover, the word "laws" in the Amendment was not intended to relieve a State from the inhibitions of the equal protection and due process clauses of the Constitution, excepting, of course, where the purpose of the Twenty-first Amendment necessarily so requires, or where there appears upon the face of the Amendment a classification recognized thereby. Certainly the classification of foreign beers with reference to the laws of their respective States of origin is not a classification which appears upon the face of the Amendment or which subserves its purpose or which is in any sense recognized thereby. It is not conceivable that the sovereign people have by sheer inadvertence repealed as to the subject matter of alcoholic traffic the commerce clause and the Fourteenth Amendment *in toto;* particularly where these provisions of the Constitution are needed to buttress the Twenty-first Amendment itself. It is also difficult to understand that the commerce clause of the Federal Constitution remains subject to the Fifth Amendment but that now a State may exercise jurisdiction over the subject matter of interstate commerce wholly relieved of the inhibitions of the Fourteenth Amendment, and be at the same time empowered to enact retaliatory legislation which may drive a sister State in a less favored economic position to abandon resort to the second section of the

Twenty-first Amendment while its stronger sister effectually drives it to the wall by recourse to this very Amendment.

Thus, appellees' construction of the Amendment breaks down State's rights, the effectual separate sovereignty of the several States not in favor of true nationalism, but in favor of certain economically strong States, which by reason of the immense purchasing power of millions of consumers resident therein, may compel at their specific demand, other less favored States to write and rewrite their laws at the pleasure of the economically dominant States. Neither a believer in the doctrine of State rights or in the economic unity of the Nation or in ever growing nationalism can subscribe to this interpretation of the Twenty-first Amendment.

The dilemma must be resolved by the principles laid down by Mr. Justice Cardozo in *Baldwin* v. *Seelig.*

III.

Discussion of Authorities Cited by Appellees in Support of Retaliatory Legislation.

No authorities have been offered by appellees in their brief to support their contention that a State has the right to enact retaliatory legislation, the taking effect of which is conditioned upon the absence or presence in the laws of other States of statutory provisions objectionable to such State. But on pages 13 and 14 of the brief of appellees in the Missouri cases, numbered 252 to 256, in which practically the same questions are presented as in this case, several cases are offered in support of such alleged power.

The first case is that of *Philadelphia Fire Association* v. *New York,* 119 U. S. 110. The statute involved in this case was a law of New York which provided that whenever any other State required a greater license fee from a fire insurance company domiciled in New York for the privilege of doing business in such State than was required by New York from foreign companies for the privilege of doing business in the State of New York, the Insurance Commissioner of New York was required to charge companies from such other State as a prerequisite to their rights to do business in New York a license fee equal to that imposed by such State on New York companies.

Appellant company had operated in New York under annual certificates from its insurance department for many years. Pennsylvania, the State of appellant company's domicile, then passed a law taxing foreign fire insurance companies three per cent of the amount of annual premiums collected in Pennsylvania for the preceding year as a prerequisite to the granting of a certificate of authority. New York thereupon demanded the same tax from appellant company. It was held by this Court (1) that appellant could not claim the benefit of the equal protection clause since it was not "within the jurisdiction" of New York, and (2) that insurance is not a "transaction of commerce." This Court on page 119 said:

> "If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the state or within its jurisdiction. It is outside, at the threshhold, seeking admission, with consent not yet given."

Hence, it will be seen that the validity of the retaliatory legislation was not considered by this Court.

In the case of *Hendrick* v. *Maryland*, 235 U. S. 610, likewise cited by appellees in support of this proposition, the decision reveals that Maryland had a law providing that any owner or operator of an automobile using the highways of Maryland should be required to hold a certificate of registration under the laws of Maryland; but with the proviso that any owner or operator, resident of another State, who had complied with the laws of registration of the State of his residence, might, upon application therefor, obtain permission from the Motor Vehicle Commissioner of Maryland to operate his automobile upon its highways for a limited period without registration in Maryland, but that such proviso or exception should not apply to residents of the District of Columbia. Appellant, a resident of the District, was arrested in Maryland for operating his automobile on its highways without a certificate of registration from Maryland. Appellant claimed that such Act was void because it discriminated against residents of the District of Columbia. This Court, however, did not pass upon such question, as is shown in the following quotation from page 621:

> "If the statute is otherwise valid, the alleged discrimination against residents of the District of Columbia is not adequate ground for us now to declare it altogether bad. At most they are entitled to equality of treatment, and in the absence of some definite and authoritative ruling by the courts of the state we will not assume that upon a proper showing this will be denied. The record fails to disclose that Hendrick had complied with the laws in force within the District of Columbia, or that he applied to the Maryland Commissioner for an identifying tag or marker—prerequisites to a limited use of the highways without cost by residents of other states under the plain terms of Sec. 140a. He cannot therefore set up a claim of discrimination in this particular."

This case not only fails to sustain the right to discriminate but, inferentially, at least, suggests that residents of the District of Columbia are entitled to "equality of treatment" with residents of the various States of the Union.

The case of *Kane* v. *New Jersey*, 242 U. S. 160, presented the question as to whether one State is required to grant reciprocity to the owners of automobiles from other States in the use of its highways and this Court there held that while many States had provided for such reciprocity in their laws, the absence of such provisions constituted no discrimination against non-residents. Hence, it will be seen that this case does not support such proposition.

Appellees in the instant case have suggested that the case of *Whitfield* v. *Ohio*, 297 U. S. 431, supports the right of a State to discriminate against the products of other States. Appellant Whitfield was prosecuted in Cleveland for violation of an Ohio law forbidding the sale in the open market of convict-made goods of another State. Ohio likewise had a similar statute forbidding the sale in the open market of convict-made goods in Ohio. This Court in its opinion discusses the Hawes-Cooper Act, declaring it to be in substance the same as the Wilson Act concerning intoxicating liquors in that it abolished the original-package doctrine as to convict-made goods. The opinion declares that it is well known that free labor, properly compensated, cannot compete with convict labor, and apropos of this fact says on page 439:

> "A state basing its legislation upon that conception has the right and power, so far as the Federal Constitution is concerned, by non-discriminating legislation, to preserve its policy from impairment or defeat, by any means appropriate to the end and not inconsistent with that instrument."

It will be noted that this Court expressly requires the legislation to be non-discriminating.

The case of *Kentucky Whip & Collar Co.* v. *Illinois Central R. R. Co.*, 299 U. S. 334, discusses the Ashurst-Summers Act which followed the Hawes-Cooper Act and which makes it unlawful to ship convict-made goods in interstate commerce into any State where the goods are intended to be received, possessed, sold or used in violation of the laws of such State. The Court shows on page 350 that the trend of laws on convict-made goods follows closely the Congressional Acts on transportation of liquor and that the Act under discussion is analogous to the Webb-Kenyon Act. Nothing in the decision supports appellees' proposition that retaliatory or discriminatory legislation can be indulged in by any State against certain of its sister States.

The case upon which chief reliance is placed by appellees and by the three-judge statutory court of Michigan is *A. & P. Tea Co.* v. *Grosjean*, 301 U. S. 412, ordinarily referred to as the *Louisiana chain store tax* case. The sole question in this case was whether the State of Louisiana in determining the amount of tax to be collected from chain stores operating within the State of Louisiana, could take into consideration the number of stores of the same chain operating outside of Louisiana. This Court had previously held that a State has the power to graduate chain store taxes upon the basis of the number of chain stores in the chain, on the theory that the greater number of stores the greater the competitive advantage of each store of such chain. Theretofore, such laws had been based on the number of stores within the particular State levying the graduated tax. However, the Louisiana law, for the purpose of determining such competitive advantage to the stores in the State of Louisiana, included all stores in the chain whether within or without the State, although the tax was levied against such stores only as were located within Louisiana. In discussing this competitive advantage, this Court said:

> "If the competitive advantages of a chain increase with the number of its component links, it is hard to see how these advantages cease at a state boundary. Under the findings a store belonging to a chain of one hundred, has not the same competitive advantages as one of one hundred Louisiana stores belonging to a national chain of one thousand."

It will, therefore, be seen that this case does not in any manner uphold the right of a State to exert extra-territorial pressure upon any other State, its Legislature or its people, but merely permits the State, in determining the amount of tax to be levied within its borders to take into consideration any facts which will assist it in determining the respective competitive advantages of the stores within its jurisdiction.

IV.

Reply Argument.

1. The adoption of a regulation merely postponing the effective date of the challenged regulation does not render the present controversy moot.

Pierce v. *Society of Sisters,* 268 U. S. 510, 535, 536;
Vicksburg Water Works Co. v. *Vicksburg,* 185 U. S. 65, 82 (46 L. Ed. 808, 815).

2. Appellee's contention is unsound that appellant is not entitled to claim the benefit of the equal protection clause in respect to its interstate alcoholic sales and deliveries to its customers, the licensed wholesalers resident within the State of Michigan and to obtain relief from threatened damage to that business, because such customers, residents of the State of Michigan, are by the challenged act and regulation deprived of the equal protection of the laws.

Pierce v. *Society of Sisters, supra;* and cases cited, p. 536;
Cases cited appellant's brief, p. 19.

3. If appellant's contentions concerning the unavailability to the appellant of the equal protection clause were sound, appellee's distinction becomes immaterial because appellant also relies upon the due process clause and the appellee concedes that the benefits of this clause are not limited to persons "within the jurisdiction of Michigan, appellee's brief, first paragraph p. 19, and appellee's discussion of

cases, p. 17, 18, 19; appellant's reliance on the due process clause, appellant's brief, p. 5, 6, 56;

Louis K. Liggett Co. v. *Baldridge*, 278 U. S. 105, 113;

also fourth specification of error, appellant's brief, p. 12, appellant's bill of complaint, Clause 11, D. R. 14, 29, amended section 11 G. R. 27, 29.

4. Appellee has offered no substantial reason to show that Section 40 of the Michigan Liquor Control Act depending for its application upon the laws of the State of origin of imported beer is not subversive of the second section of the Twenty-first Amendment or that such a law has a discernable public object and is, therefore, within the police power of the State.

(a) It is unsound to contend that Section 9 of the Indiana Beverage Act does not operate to channelize beer coming into the State of Indiana.

State Board of Equalization v. *Youngs Market Co.*, 299 U. S. 59, 62.

(b) It is not sound to contend that the requirement of an additional fee for State-wide privileges as against a smaller fee for local privileges enjoyed by the wholesaler without the importing privilege under the Indiana Act, or the requirement of additional surety bond to cover taxes on out of State beer in an equal amount imposed upon the local brewer, or the limitation in number of Ports of Entry of foreign beer is retaliatory or merely discriminatory against foreign beer or that the fact that the holders of Port of Entry permits are permitted as buyers to select brands of foreign beer, without any compulsion of law to discriminate against any out State beer, discloses any ulterior economic motive of discrimination against foreign producers divorced from regulation, especially when all licensed wholesalers in the State may sell foreign beer, when once imported, upon the same terms upon which they sell domestic beer.

(c) In contrast with the Michigan Act the right to import or the manner of importation does not under the Indiana Act turn upon the kind of law the State of origin may have in force.

(d) It is not a correct representation of the position of the appellant to assert that appellant contends that the exercise by one State of the dispensation accorded by Section 2 of the Twenty-first Amendment operates to deprive any other State of any enactment properly within such dispensation and that, therefore, the first enacting State obtains any monopoly of advantage under this amendment.

(e) A retaliatory Act such as the Michigan Act, if the second section of the Twenty-first Amendment is construed to bring such retaliatory legislation within the dispensation accorded by the Amendment, operates not merely to punish a State which has already enacted legislation obnoxious to the four criteria set up in amended Section 40 of the Michigan Act, but is equally effective to deter States, which have not enacted any legislation making use of the dispensation of the Twenty-first Amendment, from enacting statutes which would bring their alcoholic products within the doom of the four criteria of the Michigan Act.

(f) Whether or not the Alcoholic Beverage Act of Indiana is a retaliatory Act rather than one primarily concerned with the policing of the respective streams of domestic and foreign beer, the rights of the appellant in no sense turn on what may be the will of the Legislature of Indiana so far as the rights of the appellant under the commerce clause and the Fourteenth Amendment in respect to its shipments in interstate commerce into Michigan may be concerned.

(g) The appellees have wholly failed in their brief to deny even perfunctorily that the Michigan Act and the interpretation of the Twenty-first Amendment which would warrant such legislation will impair the integrity of the Twenty-first Amendment.

5. *Comparative view of a situation in Indiana and Michigan in respect to the beer industry.*

Indiana has but 17 licensed breweries.

Michigan has 53 licensed breweries.

Under the Indiana Alcoholic Beverage Act there can be but one (1) brewery for each 175,000 of population according to the last Federal census, or 18 breweries in all until after 1940 (Section 8, Ind. Al. Bev. Act).

Compared with 17 domestic breweries, Indiana has 13 port of entry licenses outstanding through which out-State beer may enter Indiana.

Both the breweries and port of entry licensees post bonds for payment of State gallonage taxes at same rate on domestic and foreign beer.

In the fiscal year 1937:

Indiana's 17 breweries produced 2,254,490 gallons of beer.

Michigan's 53 breweries produced 3,393,000 gallons.

Indiana has a population, according to last Federal decennial census, of 3,238,000; Michigan, 3,393,479.

According to the finding of facts, but 20% of the beer consumed in Michigan was imported before the present Act.

According to various tax collection reports of Indiana Excise Administrator, 29% of the beer consumed in Indiana is imported.

(Except as otherwise noted above, statistics are taken from United States Treasury Department Statistics, Fiscal Year 1937, p. 7).

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 130

INDIANAPOLIS BREWING COMPANY, INC.,
Appellant,
vs.
THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

MOTION TO AFFIRM.

✓RAYMOND W. STARR,
Attorney General of the State of Michigan;
EDMUND E. SHEPHERD,
Assistant Attorney General,
Counsel for Appellees.

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—6317

IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, IN EQUITY

No. 8269

INDIANAPOLIS BREWING COMPANY, INC., AN INDIANA CORPORATION,

Plaintiff and Appellant,

vs.

THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN, EDWARD W. McFARLAND, HALE G. KNIGHT, AND VEROLD F. GORMELY, INDIVIDUALLY AND AS MEMBERS OF THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN; FRANK MURPHY AND LEON D. CASE, INDIVIDUALLY AND AS MEMBERS EX-OFFICIO OF THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN; RAYMOND W. STARR, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF MICHIGAN,

Defendants and Appellees.

APPELLEES' MOTION TO AFFIRM THE ORDERS OF THE DISTRICT COURT.

(RULE 7, PARAGRAPHS 3 AND 4; RULE 12, PARAGRAPH 3.)

The appellees, by Raymond W. Starr, Attorney General of the State of Michigan, respectfully move the Supreme

Court of the United States to affirm the several orders of the District Court of the United States for the Eastern District of Michigan, Southern Division, from which appeal is sought, for the following reasons:

1. Because it manifestly appears that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

2. Because consideration of the questions involved in this appeal is foreclosed by former decisions of this Court in the cases presently cited.

Supporting Brief.

In support of the foregoing motion to affirm, appellees make the following suggestions:

First. The sole question for decision may be stated as follows:

Without violating the commerce clause of Article 1, Section 8, of the Federal Constitution, or the 'equal protection clause' of the Fourteenth Amendment, may the State of Michigan, in the valid exercise of its sovereign police powers with respect to the manufacture and sale of intoxicating liquors (Article XVI, Section 11, Michigan State Constitution), prohibit its licensees from 'purchasing, receiving, possession or selling any beer manufactured in any state,' the laws of which

(a) require a licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in this state;

(b) or which deny the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license;

(c) or which prohibit licensed wholesalers of beer therein from possessing or selling beer purchased in this State, unless the one from whom purchased has secured a license and paid a fee therein, when such seller neither transports the beer into said State nor sells the same therein;

(d) or which impose any higher taxes or inspection fees upon beer manufactured in this State when transporting into or sold therein, than is imposed upon beer manufactured and sold within said State?

A statute of the State of Michigan so provides, and appellant claims it is unconstitutional; but the District Court sustained its validity. Act No. 8, Public Acts of the State of Michigan, Extra Session 1933, Section 40, as amended by Act No. 281, Public Acts, State of Michigan, 1937.

Second. The District Court held, and we think correctly so, that 'a Michigan statute designating ten states as discriminatory with respect to importation of out-of-state beer and prohibiting the purchase, receipt, possession, or sale of any beer manufactured in those states is not unconstitutional as an unreasonable classification in violation of the equal protection clause of the Federal Constitution, where the statute operates equally on all ten states, since Michigan could regulate its own industry and control its own market to the extent that its industries were elsewhere excluded, and that such exclusion threatened their economic stability.' Twenty-first Amendment, Federal Constitution.

Indianapolis Brewing Co. v. *Liquor Control Commission* (1938), 21 Fed. Supp. 969.

Third. This question, we respectfully submit, is controlled in principle by *State Board of Equalization of California* v.

Young's Market Co. et al., 299 U. S. 59, 57 S. Ct. 77, 81 L. Ed. 38.

And, as observed by Circuit Judge Simons in the court's opinion, the issue is narrowed to a consideration of appellant's claim that 'a classification which differentiates the product of certain states from that of other states is wholly arbitrary and capricious, and void under the equal protection clause.'

> "There exists no reasonable basis, it says, for this difference of treatment, and the regulation has no relation to the exercise of the police power of the state in protecting the health, safety, morals, and welfare of its people. Nor does it aid in policing the state's regulatory laws governing the manufacture and sale of beer. Its purpose, it contends, is purely retaliatory and economic, for Michigan has no concern with the laws of other states and no power to impose its will by economic restrictions or prohibitions upon the law-making power of other states. Nor has it the power to enact statutes or adopt regulations the enforcement of which may be subject to the exercise of legislative power in another state."

The District Court, in a well reasoned opinion (21 Fed. Supp. 969), rejects these several contentions, holding in effect that the scope of State police power is not limited by narrow connotations to be assigned to the phrase 'the protection of the health, safety and morals of the people,' but that it has been extended to the promotion of fair competitive conditions and equalization of economic advantages, even though the evils requiring regulation arise solely from operations in part the result of extrastate transactions.

Such, we apprehend, is the principle announced by this Court in the *Young's Market* case, *ante*, and the views expressed by the lower court are well sustained by the authorities cited in the opinion.

Fourth. Without indulging in extended quotations, we respectfully submit that appellees' motion to affirm at this time should be granted upon the following authority:

Barbier v. *Connolly,* 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923;

Lake Shore & M. S. Railroad Co. v. *Ohio,* 173 U. S. 285, 19 S. Ct. 465, 43 L. Ed. 702;

Chicago B. & O. Railroad Co. v. *Illinois Drain Commissioners,* 200 U. S. 561, 592, 26 S. Ct. 341, 50 L. Ed. 596;

Cox v. *Texas,* 202 U. S. 446, 26 S. Ct. 671, 50 L. Ed. 1099;

Mutual Loan Co. v. *Martell,* 222 U. S. 225, 32 S. Ct. 74, 56 L. Ed. 175.

(And see, especially:)

State Board v. *Young's Market Co.,* 299 U. S. 59, 57 S. Ct. 77, 81 L. Ed. 38; and

Great Atlantic & Pacific Tea Co. v. *Grosjean,* 301 U. S. 412, 57 S. Ct. 772, 778, 81 L. Ed. 1193, 112 A. L. R. 293.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

INDIANAPOLIS BREWING COMPANY, INC., APPELLANT,

v.

THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN, *et al.*, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

APPELLEE'S BRIEF

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Const., United States, 21st Amendment, § 2	6, 9, 10, 11, 22, 24, 25, 26, 29, 30, 31
Const., Michigan, Article 16, § 11 (Liquor Control Amendment)	4

STATUTES CITED

Michigan Liquor Control Act (Act 8, Pub. Acts Mich. 1933, Ex. Sess. [Mich. Stat. Ann. §§ 18.971-18.1021])	2, 4, 5
Idem., § 40, as amended by Act 281 Pub. Acts, Mich. 1937 (Stat. Ann. Pocket Supplement § 18.1011)	2, 3, 6, 7, 9, 10, 11, 23, 26, 28, 31
Indiana Liquor Law (Chap. 226, Acts 1935)	2, 32, 33

MISCELLANEOUS

11 Am. Jur., Const. Law, § 270	10
11 Am. Jur., Const. Law, §§ 53, 54	29
Fletcher, Cyc. Corp. (Perm. Ed.) § 8422	17

No. 130

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

INDIANAPOLIS BREWING COMPANY, INC., APPELLANT,

v.

THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN, *et al.*, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

APPELLEE'S BRIEF*

I

OFFICIAL REPORT OF OPINION DELIVERED IN THE COURT BELOW

The official report of the opinion delivered in the court below is

> *Indianapolis Brewing Co., Inc., v. Liquor Control Commission of Michigan* (Feb. 3, 1938), 21 Fed. Supp. 969.

That opinion is set forth in the printed transcript of record (36-41).

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*Unless otherwise plainly indicated, figures in parentheses throughout this brief, e.g. (24), refer to pages of the printed transcript of record.

II

CONCISE STATEMENT OF GROUNDS OF JURISDICTION

Appellant's counsel correctly states the grounds of jurisdiction.

This Court, on October 10, 1938, noted probable jurisdiction (Rule 12).

Although at that time he raised no jurisdictional questions, the attorney general, in order that the Court may be fully informed, now directs attention to events which occurred subsequent to the district court's decision February 3, 1938, and its final decree March 5, 1938 (50).

It appears of record that, on December 14, 1937, the Liquor Control Commission of the State of Michigan, obeying the mandate of § 40 of the Michigan Liquor Control Act, as amended (Act No. 281, Pub. Acts Mich. 1937 [Mich. Stat. Ann., Pocket Supplement, § 18.1011]), made and adopted a regulation, upon which plaintiff's suit is based, designating as discriminatory the State of Indiana and nine other states of the Union (22).

It does not appear of record that on March 14, 1938, after the decree had been entered, the Alcoholic Beverage Commission of Indiana and the Liquor Control Commission of Michigan contemporaneously adopted reciprocal regulations which, in effect, suspended operation of Indiana's discriminatory laws (Chapter 226, Acts 1935, Chapter 197, Acts 1937, Burns Revised States, Supplement, §§ 12,801, 12,901), and Michigan's anti-discriminatory statute (§ 40, *supra*).

The Michigan regulation of March 14, 1938, reads as follows:

> Pursuant to Section 40 of the Michigan Liquor Control Act on December 14, 1937, Indiana among other states was designated as a state, the laws, rules, regulations of which discriminate against Michigan beer.
>
> The Alcoholic Beverage Commission of Indiana having this day adopted certain regulations, it is therefore resolved that the effective date of the order of the Liquor Control Commission of the State of Michigan entered of record December 14, 1937, as against the State of Indiana be, and the same is now changed from March 14, 1938, and is now extended to March 30, 1939.

Since this understanding probably expends its legal force as a 'gentlemen's agreement' pending outcome of litigation, or as a truce made in contemplation of some hoped-for legislative enactments which might possibly end the controversy, it has not, we think, rendered moot the questions presented here.

III

CONCISE STATEMENT OF THE CASE

Appellant's counsel, in relating the facts, have been eminently fair, and we make only such statement of the case as may be deemed necessary in correcting a few slight inaccuracies or omissions (Rule 27).

(1) It is said that appellant was 'a manufacturer of beer duly licensed to import into and sell in the State of

Michigan (Brief, p. 2),' and that 'appellant alleged and exhibited its license to do business within the State of Michigan (Brief, p. 5).'

We observe that the license referred to (20) was not a grant or permit to enter the State of Michigan for the purpose of transacting intrastate business as a foreign corporation; that it was issued by the Liquor Control Commission of the State of Michigan April 29, 1937 (prior to amendment of § 40 of the Michigan Liquor Control Act [Act No. 281, Pub. Acts Mich. 1937, effective July 21, 1937]), pursuant to a valid regulation which required that out-state breweries be licensed with a 'Seller's Contract,' adopted in exercise of certain broad, general administrative powers conferred on the Commission by the State Constitution,[1] and by the legislature.[2]

This particular regulation has been sustained by the District Court of the United States for the Western District of Michigan. *Zukaitis v. Fitzgerald, Governor* (Dec. 15, 1936), 18 Fed. Supp. 1000, 1005.

The plaintiff has never entered the State of Michigan for the purpose of conducting intrastate business as a foreign corporation (4, 5, 24); it has not been licensed by that state as a foreign corporation; it has no agents in that commonwealth; its sales are consummated in the course of interstate commerce (4); and it invoked the jurisdiction of the district court on the ground of diversity of citizenship (5).

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[1] Section 11, Article 16, Michigan State Constitution:

"*Regulation of alcoholic beverage traffic.*—The legislature may by law establish a liquor control commission, who, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this state, including the retail sales thereof; . . . . . ."

[2] Paragraph 2, § 1, Michigan Liquor Control Act:

"Except as by this act otherwise provided, the commission shall have the sole right, power and duty to control the alcoholic beverage traffic and traffic in other alcoholic liquor within the state of Michigan, including the manufacture, importation, possession, transportation and sale thereof."

(2) On page 11 of appellant's brief, counsel sets forth the grounds on which appellee moved to dismiss plaintiff's bill of complaint, as supplemented and amended (33-36).

To this, we would add the following:

> 5. That said Section 40 of the Michigan Liquor Control Act does not violate the Fourteenth Amendment to the Constitution of the United States, for the following reasons: . . . .
>
> (b) The plaintiff corporation is not a person within the jurisdiction of the State of Michigan which is denied the equal protection of the laws for the reason that the bill of complaint shows that said plaintiff corporation is organized and existing under the laws of the State of Indiana; said bill of complaint fails to allege facts which would amount to 'doing business' by said corporation within the State of Michigan or which would subject it to the service of process therein. Said bill of complaint further fails to show that it has complied with the requirements of the statute of the State of Michigan which are prerequisite to its right to do business therein as a foreign corporation or which would subject it to or bring it within the jurisdiction of the State of Michigan (35).

IV

SUMMARY OF ARGUMENT

The questions for decision involve the constitutional validity of certain 'retaliatory provisions,' so-called, of § 40 of the Michigan Liquor Control Act, as amended (Act No. 281, Pub. Acts Mich. 1937 [Mich. Stat. Ann., Pocket Supplement, § 18.1011]), tested by the 21st Amendment, the 'equal protection clause' of the 14th Amendment, § 1, and the 'commerce clause' of the Constitution of the United States (Article 1, § 8 (3)).

That portion of § 40, *supra,* which is material to an understanding of this cause, reads:

> The commission shall forthwith adopt a regulation designating the states, the laws, or the rules or regulations of which are found to require a licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in this state; or which deny the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license; or which prohibit licensed wholesalers of beer therein from possessing or selling beer purchased in this state, unless the one from whom purchased has secured a license and paid a fee therein, when such seller neither transports the beer into said state nor sells the same therein; or which impose any higher taxes or inspection fees upon beer manufactured in this state when transporting into or sold therein, than is imposed upon beer manufactured and sold within said state, the regulation adopted shall prohibit all licensees from purchasing, receiving, possessing, or selling any beer manufactured in any state therein designated, said regulation to become effective ninety days after its

adoption. Any licensee or person adversely affected shall be entitled to review by certiorari to the proper court the question as to whether the commission has acted illegally or in excess of authority in making its finding with respect to any state.

Our contentions, tersely stated, are:

Point One: Section 40, Michigan Liquor Control Act, as amended (*supra*), does not deny to plaintiff the 'equal protection of the laws' of the State of Michigan.

[1] Plaintiff, as a domestic corporation which has never made legal entry into the State of Michigan for the purpose of conducting intrastate business as a foreign corporation, is not a person 'within the jurisdiction' of the State of Michigan, within the meaning of the language of the 14th Amendment, § 1, Constitution of the United States.

Philadelphia Fire Ass'n v. New York (1886), 119 U. S. 110;

Pembina Min. Co. v. Pennsylvania (1888), 125 U. S. 181;

New York v. Roberts (1893), 171 U. S. 658;

Blake v. McClung (1898), 172 U. S. 239;

Sully v. American Nat'l Bank (1899), 178 U. S. 289;

Cheney Brothers Co. v. Massachusetts (1818). 246 U. S. 147;

Bethlehem Motors Co. v. Flynt (1921), 256 U. S. 421;

Hanover Fire Ins. Co. v. Carr (1926), 272 U. S. 713, 49 A. L. R. 713;

Atlantic Refining Co. v. Virginia (1937), 82 U. S. (L. ed.) 52;

Conn. Gen'l Life Ins. Co. v. Johnson (1938), 58 S. Ct. 436; 82 L. ed. 457;

State v. Blake (1912), 241 Mo. 100, 144 S. W. 1094, 28 Ann. Cas. (1913C) 1283.

[2] Plaintiff obtained no right or authority to engage in intrastate business as a foreign corporation within the State of Michigan, by virtue of the license contract issued to it by the Liquor Control Commission (20), and the mere fact that it is engaged in interstate commerce does not entitle it to the 'equal protection of the laws' of Michigan. 14th Amendment, § 1.

Its rights, unless foreclosed upon consideration of the decision in *State Board of Equalization v. Young's Market Co.* (1936), 299 U. S. 59, depend entirely upon applicability of the 'commerce clause' (Const. Article 1, § 8 [3]).

The following cases, upon which appellant's counsel rely (p. 19, Brief), may be distinguished, generally, on the ground that the corporation involved in litigation had been licensed to do intrastate business within a state other than that of its domicile, or that it had entered the foreign state for the purpose of instituting replevin actions to recover possession of its personal property:

Louisville v. Cumberland T. & T. Co. (1912), 224 U. S. 649;

Kentucky Finance Corp. v. Paramount Auto Exch. Corp. (1923), 262 U. S. 544;

Frost v. Railroad Commission (1926), 271 U. S. 583;

Quaker City Cab Co. v. Pennsylvania (1928), 277 U. S. 389.

[3] Appellant is not entitled to assert successfully that its (interstate) business being destroyed through a claimed infringement of the constitutional rights of its customers (the licensed wholesalers and retailers of Michigan), it is entitled to 'equal protection of the laws' of Michigan.

The decisions cited by appellant's counsel (p. 18, Brief) do not sustain their position:

Truax v. Raich (1915), 239 U. S. 33;

Truax v. Corrigan (1921), 257 U. S. 312;

Terrace v. Thompson (1923), 263 U. S. 197;

Pierce v. The Society of Sisters of the Holy Names (1925), 268 U. S. 510.

[4] Since adoption of the 21st Amendment, § 2 (Const., United States), the 'equal protection clause' of the 14th Amendment, § 1, does not operate upon the liquor laws of a state.

This phase of the question is controlled by:

State Board of Equalization v. Young's Market Co. (1936), 299 U. S. 59;

and

Mahoney v. Joseph Triner Corp. (May 23, 1938), 304 U. S. 401.

See, also,

Zukaitis v. Fitzgerald, Governor (1936), 18 Fed. Supp. 1000;

State v. Davis (1937), 132 Ohio St. 308.

[5] Should it be held that plaintiff corporation is in position to invoke the equal protection clause of the 14th Amendment, § 1, and that the question is open, then we respectfully submit:

First: That the enactment of § 40, *ante,* is a valid exercise of state police power, which has expanded to promote fair competitive conditions, and the equalization of economic advantages enjoyed by other states in respect of their liquor traffic, under dispensation of the 21st Amendment, § 2.

Barbier v. Connelly (1885), 133 U. S. 27;

L. S. & M. S. Railroad Co. v. Ohio (1889), 173 U. S. 285;

C. B. & Q. Railroad Co. v. Drainage Commission (1906), 200 U. S. 561;

Bacon v. Walker (1907), 204 U. S. 311;

Mutual Loan Co. v. Martell (1911), 222 U. S. 225;

Whitfield v. Ohio (1936), 297 U. S. 431;

Great Atlantic & Pacific Tea Co. v. Grosjean (1937), 301 U. S. 412.

See, also,

Women's Kansas City St. Andrew's Society v. Kansas City (1932), 58 F (2d) 593;

Gin S. Chow v. City of Santa Barbara (1933), 217 Cal. 67;

West Bros. v. City of Alexandria (Va.—1937), 192 S. E. 881;

11 Am. Jr., Constitutional Law, § 270, and cases cited, footnote 8.

Second: Applying to legislation in question the rule of reason, it would appear that the classification employed in § 40, *ante,* is not arbitrary.

Metropolitan Company v. Brownell (1935), 294 U. S. 580;

Old Dearborn Distributing Co. v. Seagram-Distillers Corp. (1936), 299 U. S. 183;

Henneford v. Silas Mason Co. (1937), 300 U. S. 577.

Point Two: Section 40 of the Michigan Liquor Control Act, as amended, *ante*, imposes no unconstitutional burden on interstate commerce in liquor (Const., Article 1, § 83).

Under the 21st Amendment, § 2, a state may prohibit importation of alcoholic beverages from a sister state whose laws, rules, and regulations discriminate against such state; and such a law would not nullify the dispensation of the 21st Amendment, § 2.

This question, we submit, is controlled by the decisions of this Court in *State Board of Equalization v. Young's Market Co.* (1936), 299 U. S. 59; and *Mahoney v. Joseph Triner Corp.* (1938), 304 U. S. 401.

V.

ARGUMENT

POINT ONE

Section 40, Michigan Liquor Control Act, as amended, ante, does not deny to plaintiff the equal protection of the laws of the State of Michigan (Const., 14th Amendment, § 1).

[1] Plaintiff is not a person 'within the jusisdiction of the State of Michigan.'

The facts stated and the authorities cited in our 'Summary of Argument,' require little elaboration.

Although the constitutional provision forbidding a state to deny to any person 'equal protection of the laws' extends to corporate as well as natural persons (Const., 14th Amendment),[3] and a corporation is a 'person' within the equal protection clause of the 14th Amendment,[4] such benefits may not be claimed until the corporation has lawfully submitted itself to the jurisdiction of the state.

It may be helpful to consider a few of the many decisions cited in the summary (*ante*, p. 7), without extending this brief unduly.

In *Pembina Mining Co. v. Pennsylvania* (1887), 125 U. S. 181, 188, it appeared that the plaintiff mining company incorporated under the laws of Colorado, with its principal office in Alpine, Colorado, and a branch office in the city of Philadelphia, 'for the use of its officers, stockholders, agents, and employes.' The auditor general and treasurer of Pennsylvania assessed a tax against the corporation for 'office license,' under authority of an act of the legislature of that commonwealth. The state courts affirmed the validity of the assessment, and from final order of the supreme court appeal was had to this Court. It was claimed that the act in question was in conflict with the equal protection of the 14th Amendment, § 1.

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[3] *Power Manufacturing Co. v. Saunders* (1927), 274 U. S. 490.

[4] *Louis K. Liggett Co. v. Lee* (1933), 288 U. S. 517.

The Court say:

> The application of the Fourteenth Amendment of the Constitution to the statute imposing the license tax in question is not more apparent than the application of the clause of the Constitution to the rights of citizens of one State to the privileges and immunities of citizens in other States. The inhibition of the amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of person there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. As said by Chief Justice Marshall, 'The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men.' *Providence Bank v. Billings,* 4 Pet. 514, 562. The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the State. The plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. The office it hires is within such jurisdiction, and on condition that it pays the required license tax it can claim the same protection in the use of the office that any other corporation having a similar office may claim. It would then have the equal protection of the law so far as it had anything within the jurisdiction of the State, and the constitutional amendment requires nothing more.

The clearest statement of this doctrine, we think, is found in the language of Mr. Justice Harlan, in *Blake v. McClung* (1898), 172 U. S. 239, 260, where a foreign corporation had presented its claim in the State of Tennessee against a British corporation in process of liquidation. It claimed that because of certain priorities granted citizens of that state under its laws, it had been denied equal protection of the laws.

Mr. Justice Harlan, speaking for the Court:

> It is equally clear that the Virginia corporation cannot rely upon the clause declaring that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' That prohibition manifestly relates only to the denial by the State of equal protection to persons 'within its jurisdiction.' Observe, that the prohibition against the deprivation of property without due process of law is not qualified by the words 'within its jurisdiction,' while those words are found in the succeeding clause relating to the equal protection of the laws. The court cannot assume that those words were inserted without any object, nor is it at liberty to eliminate them from the Constitution and to interpret the clause in question as if they were not to be found in that instrument. Without attempting to state what is the full import of the words, 'within its jurisdiction,' it is safe to say that a corporation not created by Tennessee, nor doing business there under conditions that subjected it to process issuing from the courts of Tennessee at the instance of suitors, is not, under the above clause of the Fourteenth Amendment, within the jurisdiction of that State. Certainly, when the statute in question was enacted the Virignia corporation was not within the jurisdiction of Tennessee. So far as the record discloses, its claim against the Embreeville Company was on account of coke sold and shipped from Virginia to the latter corporation at its place of business in Tennessee. It does not appear to have been doing business in Tennessee under the statute here involved, or under any statute that would bring it directly under the jurisdiction of the courts of Tennesee by service of process on its officers

> or agents. Nor do we think it came within the jurisdiction of Tennessee, within the meaning of the Amendment, simply by presenting its claim in the state court and thereby becoming a party to this cause. Under any other interpretation the Fourteenth Amendment would be given a scope not contemplated by its framers or by the People, nor justified by its language.

Holding that a North Carolina statute, providing that every manufacturer of automobiles engaged in the business of selling them in the state must pay a license tax of $500, but further providing certain exemptions, was discriminatory, contrary to the 14th Amendment, this Court assumed that the corporations which invoked the 'equal protection clause' were subject to the jurisdiction of that State. *Bethlehem Motors Corporation v. Flynt* (1921), 256 U. S. 421, 424.

The Court said on that occasion:

> "This court has decided too often to need citation of the cases that corporations doing business in a State and having an agent there are within the jurisdiction of the State for the purpose of suit against them, and we may assume that the principle is applicable here and that the Pennsylvania corporation, the Indiana corporation and the Delaware corporation are within the jurisdiction of the State and subject to its laws, equally with the corporations of the State."

It must be clear, under the authorities cited, that the Indianapolis Brewing Company, Inc., is not in a favorable position to claim the 'equal protection of the laws' of the State of Michigan. By its own pleadings is it condemned.

The bill of complaint recites that plaintiff is an Indiana corporation, 'and is not a citizen or resident of the State of Michigan, the Eastern District of Michigan, or the Southern Division of said District (1).'

Its sales in Michigan 'have been consummated on written, telegraphic, or telephonic orders from plaintiff's customers in said State to plaintiff in the State of Indiana. Such orders have been in all cases accepted by plaintiff in the State of Indiana, and call for delivery either under direction of plaintiff or its customers at said customer's place of business, or other designated destination, in the State of Michigan (4).'

The suit and matter in controversy 'is wholly between citizens of different states and can be fully determined as between them (5).'

It appears from such averments of plaintiff's bill, as amended and supplemented, from statements in counsel's proposed findings of fact (43), and from supporting affidavits on file in this cause (56-62), that this Indiana corporation has no property, real or personal, within the State of Michigan, which requires 'protection,' or upon which process might be levied; that it pays no local taxes assessable upon its property within the State, and contributes nothing to Michigan's common wealth; that it has assumed no burdens or obligations resting upon a Michigan citizen or resident, natural or corporate; that it transacts no intrastate business within Michigan's borders; that it has no office or place or business, and employs no agents or servants in that commonwealth, for the purpose of furthering its commercial interests, intrastate or interstate; and that it has within the State of Michigan no officer authorized to accept service of judicial process.

It may not be said, we respectfully submit, that plaintiff is a person 'within (the) jurisdiction' of the State of Michigan.

[2] The 'license-contract (20) issued by the Liquor Control Commission of the State of Michigan, did not operate to bring the plaintiff within the jurisdiction of the State, and accorded it no privilege to engage in intrastate commerce.

On page 18 of appellant's brief, appears the following assertion:

"Since the appellant is duly licensed to engage in interstate commerce in alcoholic liquors under the laws of Michigan, it is, although a corporation of the State of Indiana, entitled to claim the equal protection of the laws while engaged in interstate commerce."

Citing:

Louisville v. Cumberland Telephone Co. (1912), 224 U. S. 649;

Kentucky Finance Corp. v. Paramount Auto Exch. (1923), 262 U. S. 544;

Frost Trucking Co. v. Railroad Commission (1926), 271 U. S. 583, 593, 594;

Quaker City Cab Co. v. Pennsylvania (1928), 277 U. S. 389, 400;

Fletcher (Cyc. Corp.) (Perm. ed) § 8422.

The statement in Fletcher's Cyclopedia, § 8422, however, is in respect of unlawful interference with commerce (Const., Article 1, § 8 [3]), and does not treat of the rights of a foreign corporation under the equal protection clause of the 14th Amendment.

The case of *Louisville v. Cumberland Telephone Co.* (1912), 224 U. S. 649, involved a franchise granted by the State to a telephone company, and difficulties which arose between the corporation and the city of Louisville. We have read the opinion carefully, but find no reference to the equal protection clause of the 14th Amendment.

In *Kentucky Finance Corporation v. Paramount Exchange* (1923), 262 U. S. 544, it is held that 'a corporation which goes into a State other than that of its creation for the lawful purpose of possessing itself, by a permissible action in her courts, of specific personal property unlawfully taken out of its possession elsewhere and fraudulently carried into that State, is a person within the jurisdiction of that State, within the meaning of the 14h Amendment, for all the purposes of that undertaking, and entitled to the equal protection of the laws.

That, surely, is not the situation in the case at bar, for plaintiff has never placed itself within the jurisdiction of the State of Michigan, nor has it submitted itself to the jurisdiction of a state court for the purpose of recovering possession of tangible personal property fraudulently removed to Michigan.

Although, in *Frost Trucking Company v. Railroad Commission* (1926), 271 U. S. 583, plaintiff claimed that it had been denied the equal protection of the laws in violation of the 14th Amendment (p. 585), this Court did not have occasion to reach that question, but held that the statute of California called in question there was constitutionally invalid under the due process clause.[5]

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[5] Under the Auto Stage and Truck Transportation Act of California, as amended in 1919, and as construed and applied by the state supreme court in this case, private carriers by automobile for hire cannot operate over the state highways between fixed termini without having first

As observed in *Blake v. McClung* (1898), 172 U. S. 239, the due process clause of the 14th Amendment is not limited by the words 'within its jurisdiction,' as is the equal protection clause of the same section.

Moreover, it appears from the printed transcript of record in the *Frost Case, supra,* page 1, that the Frost & Frost Trucking Company, petitioner, was a co-partnership doing business under that name and style; and that it was engaged in intrastate commerce or transportation.

The remarks of this Court in respect of the rights of foreign corporations (pp. 594-598) were *obiter dictum.* And the cases cited in the opinion go no further than to hold that a state is without power to impose upon a foreign corporation doing business within its borders the condition that it surrender any Federal constitutional right. In the majority of these decisions, the commerce clause had been violated and the equal protection clause was not involved.

This Court, in *Quaker City Cab Co. v. Pennsylvania* (1928), 277 U. S. 389, plaintiff in error was a New Jersey corporation authorized to do business in Pennsylvania as a foreign corporation, and was 'within the jurisdiction' of the Commonwealth. There was no question of interstate commerce. Mr. Justice Butler said (p. 400):

> "The equal protection clause extends to foreign corporations within the jurisdiction of the State and safeguards to them protection of laws applied equal-

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secured from the Railroad Commission a certificate of public convenience and necessity, and therein they not merely become subject to regulations appropriate to private carriers but submit themselves to the condition of becoming common carriers and of being regulated as such by the Commission. *Held* violative of the due process clause of the Fourteenth Amendment.

> ly to all in the same situation. Plaintiff in error is entitled in Pennsylvania to the same protection of equal laws that natural persons within its jurisdiction have a right to demand under like circumstances. *Kentucky Finance Corp. v. Paramount Exch.*, 262 U. S. 544, 550 . . . . The right to withhold from a foreign corporation permission to do local business therein does not enable the State to require such a corporation to surrender the protection of the Federal Constitution. . . ."

[3] Appellant is not 'within the jurisdiction' of the State of Michigan because, as claimed, the constitutional rights of its customers are infringed.

The cases cited, on page 18 of appellant's brief, are readily distinguished:

Truax v. Raich (1915), 239 U. S. 33;
Truax v. Corrigan (1921), 257 U. S. 312;
Terrace v. Thompson (1923), 263 U. S. 197;
Pierce v. The Society of Sisters of the Holy Names (1925), 268 U. S. 510.

In *Truax v. Raich, supra,* plaintiff, an inhabitant of Arizona, brought action in the district court of that State, to restrain enforcement of an act relative to the employment of aliens, and, on appeal to this court, it was held:

> "A State may not, in order to protect citizens of the United States, in their employment against non-citizens of the United States in that State, require that employers only employ a specified percentage of alien employes—such a statute denies to alien inhabitants the equal protection of the law. . . ."

It was also held that although a statute may only render an employer liable to prosecution, if it operates directly upon the employment of the employe, the latter is affected directly, has no adequate remedy at law, and if the statute is unconstitutional, is entitled to equitable relief.

This, we think, does not mean that an out-state corporaiton may claim equal protection of the laws of Michigan in behalf of its interstate customers.

No support for appellant's position is found in *Truax v. Corrigan, supra* (1921), 257 U. S. 312, for there the plaintiffs maintained and operated a restaurant (as copartners), while the defendants were cooks and waiters formerly in the employ of plaintiffs, together with the labor union and the trades assembly of which they were members. All parties were residents of the State of Arizona (pp. 320, 321). This Court, in that case, held unconstitutional a state law, regulating injunctions in labor controversies, because it discriminated between the classes affected.

In *Terrace v. Thompson* (1923), *supra*, 263 U. S. 197, suit was brought to enjoin the attorney general of Washington from enforcing the Anti-Alien Land Law of that State, c. 50, Laws, 1921, on the ground that it was in conflict with the due process clause and the equal protection clause of the 14th Amendment; with the treaty between the United States and Japan, and with certain provisions of the constitution of the State.

The parties were residents of the State of Washington.

This Court dismissed the bill, and held the statute valid as against the objections raised.

Pierce v. Society of Sisters, etc. (1925), 268 U. S. 510, involved challenge to Oregon's Compulsory Education Act, which required every parent, guardian or other person having control of a child between the ages of eight and sixteen years to send him to the public school.

Plaintiff, an Oregon corporation devoting its property and effort to secular and religious education and care of children in that State, filed its bill for injunction, in the district court of the United States for the District of Oregon, against the Governor and others.

Declaring the Act unconstitutional, because offensive to the 14th Amendment, this Court also held that where corporations owning and conducting schools are threatened with destruction of their business and property through the improper and unconstitutional compulsion exercised by this statute upon parents and guardians, their interest is direct and immediate and entitles them to protection by injunction.

While it is true that in the case at bar the statute (§40, *ante*) operates directly upon the domestic licensees of the Liquor Control Commission, and by indirection upon the plaintiff as an out-state corporation, while engaged in interstate commerce, the principle announced in the *Pierce Case, supra,* has no application here.

And, we respectfully submit, the decisions cited *ante* do not militate against, or in any degree modify the general rule that a corporation doing an exclusive interstate business may not have equal protection of the laws of any state unless and until it comes within its jurisdiction.

[4] Since adoption of the 21st Amendment, § 2, of the Federal Constitution, the 'equal protection clause' of the

14th Amendment, § 1, does not operate upon the liquor laws of a State.

As pointed out in our summary of argument, this phase of the question, we think, is controlled entirely by two recent decisions of this Court:

State Board of Equalization v. Young's Market Co. (1936), 299 U. S. 59; and
Mahoney v. Joseph Triner Corp. (1938), 304 U. S. 401.

In *Young's Market Case, supra,* plaintiffs were domestic corporations and individual citizens of California, engaged in selling at wholesale at one or more places within the State beer imported from Missouri or Wisconsin.

They instituted suit in the federal court for southern California, to challenge the validity of a statute of that state, and of the regulations thereunder, which imposed a license-fee of $500 for the privilege of importing beer to any place within its borders, because, it was said, such a statute would violate the commerce clause (Const., Article 1, § 8, cl. 3) and the equal protection clause of the 14th Amendment. We shall presently consider the latter claim, and this Court's decision thereon.

Speaking for the Court, Mr. Justice Brandeis said:

> "Second. The claim that the statutory provisions and the regulations are void under the equal protection clause may be disposed of. A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth. Moreover, the classification in taxation made by California rests on conditions requiring difference in treatment. Beer sold within the state comes from two sources.

> The brewer of the domestic article may be required to pay a license fee for the privilege of manufacturing it; and under the California statute is obliged to pay $750 a year. Compare *Brown-Forman Co. v. Kentucky,* 217 U. S. 563, 30 S. Ct. 578, 54 L. Ed. 883. The brewer of the foreign article cannot be so taxed; only the importer can be reached. He is subjected to a license fee of $500. Compare *Kidd v. Alabama,* 188 U. S. 730, 732, 23 S. Ct. 401, 47 L. Ed. 669."

This particular question, involving the possible relationship of the equal protection clause of the 14th Amendment, § 1, to the 21st Amendment, § 2, was raised again in *Mahoney v. Joseph Triner Corporation,* where the point was perhaps more closely pressed in briefs filed by the plaintiffs, and in a brief presented by the attorney general of the State of Indiana, as *amicus curiae.*

The statute challenged there was an enactment of the legislature of Minnesota, which provided:

> "No licensed manufacturer or wholesaler shall import any brand or brands of intoxicating liquors containing more than 25 per cent of alcohol by volume ready for sale without further processing unless such brand or brands shall be duly registered in the patent office of the United States."

The lower court held the measure unconstitutional. 11 Fed. Supp. 145, 20 Fed. Supp. 1019.

This Court, on appeal, reversed the judgment, holding that since the adoption of the 21st Amendment prohibiting the importation of intoxicating liquor into any state in violation of its laws, the equal protection clause of the 14th Amendment does not operate.

It is important to observe, before considering the opinion of this Court and the doctrine which it established, that the briefs in the *Triner Case* ably and comprehensively presented the points now stressed by counsel for appellant.

Thus, in the brief of appellee (p. 4), it was pointed out that for years prior to the 18th Amendment, the dry states were powerless fully to protect their publicly declared policy of prohibition, and that to obviate this difficulty the Congress enacted, in succession, the Wilson Act (1890, 26 Stat. 313), and the Webb-Kenyon Act (1913).

It was urged, as do counsel here, that the 21st Amendment, § 2, must be construed in the light of the Wilson Act and the Webb-Kenyon Act, and that it was the intention of the Congress to 'freeze into' the Constitution (21st Amendment) the provisions of such enactments. And as extrinsic aid to construction resort was had to congressional debates (pp. 4, 5, 6). Compare, pp. 21, 22, 23, 24, appellant's brief in the case at bar.

That point was stressed by the attorney general of Indiana, who urged that 'a merely literal interpretation' of the 21st Amendment, § 2, was inappropriate, and cited numerous decisions of this Court,[6] all of which now reappear in appellant's brief (pp. 16, 41-44, and 50) to support the same position.

This Court, however, in the *Triner Case*, ante, rejected such extrinsic aids,[7] held that the language of the second section of the 21st Amendment should be interpreted from its own clear and unmistakable terms, and that it was not, therefore, open to construction.

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[6] Indiana's Brief, Triner Case, No. 761, October Term 1937.

[7] For a comprehensive treatment of the history of the Wilson Act, the Webb-Kenyon Act, the Reed Amendment, and the 21st Amendment to the Constitution, see Brief of the attorney general of California in the *Young's Market Co. Case*.

Adhering to the principles established in the *Young's Market Co. Case,* and repeating the language of that opinion, Mr. Justice Brandeis said:

> " 'The plaintiffs argue that limitation of the broad language of the Twenty-first Amendment is sanctioned by its history; and by the decisions of this Court on the Wilson Act, the Webb-Kenyon Act and the Reed Amendment. *As we think the language of the Amendment is clear, we do not discuss these matters.'* " [Italics supplied]

And, speaking of the scope of § 2, Twenty-first Amendment, this Court say:

> ". . . .We are asked to limit the power conferred by the Amendment so that only those importations may be forbidden which, in the opinion of the Court, violate a reasonable regulation of the liquor traffic. To do so would, as stated in the *Young's Market Co. Case, p. 62,* "involve not a construction of the Amendment, but a rewriting of it.' "

[5] If the question is open, and this we doubt, then the enactment of § 40, as amended, ante, is a valid exercise of state police power, to promote fair competitive conditions, and the equalization of economic advantages enjoyed by other states under dispensation of the 21st Amendment, § 2.

May a State, in exercise of sovereign powers restored to it by the 21st Amendment, and without violating the equal protection clause of the 14th Amendment, enact a statute for the purpose of protecting its domestic beer industry; or, in the exercise of such power, is a State restricted to the protection of the health, safety, and morals of its people?

The historic and traditional definition of the term 'police power,' as one to be exercised only for the protection of the public health, safety, and morals, has been extended to include enhancement of the public convenience: *Lake Shore & Michigan Southern Railroad Co. v. Ohio* (1889), 173 U. S. 285;

—— to preservation of the general prosperity: *Bacon v. Walker* (1907), 204 U. S. 311;

—— and to preservation of the general welfare: *Mutual Loan Co. v. Martell* (1911), 222 U. S. 225.

In the early case of *Barbier v. Connelly* (1885), 133 U. S. 27, this Court said:

> ". . . But neither the Amendment (Const., 14th Amend.), broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes called its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate *so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. . .* " [Italics supplied]

Probably the most recent expression of this thought will be found in Mr. Justice Cardozo's opinion in the 'Louisiana Chain Store Tax Case,' *Great Atlantic & Pacific Tea Co. v. Grosjean* (1937), 301 U. S. 412, where it was held that taxation may be the implement of exercise of a State's police power; and hence a proper and reasonable discrimination between classes is lawful 'to promote fair competitive conditions and to equalize economic advantages.'

See, also, cases cited in our summary (*ante,* p. 10).

Applying to the legislation in question the rule of reason, it would appear that the classification employed is not arbitrary.

> "A statutory discrimination will not be set aside as denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." —*Metropolitan Co. v. Brownell* (1935), 294 U. S. 580.

Extension of the argument would add little to solution of the problem, though we shall have occasion, under 'POINT TWO,' *infra,* to revert to the subject for the purpose of meeting certain objections raised by appellant's counsel; a challenge based upon the claim that enactment of § 40, *ante,* nullifies the second section of the 21st Amendment.

POINT TWO

Section 40 of the Michigan Liquor Control Act, as amended, ante, p. 6, under dispensation of the 21st Amendment, imposes no unconstitutional burden upon interstate commerce in intoxicating liquors.

As stated in summary of argument (*ante*, p. 11), it is our contention that a State, under dispensation of the 21st Amendment, may prohibit importation of alcoholic beverages, from a sister State whose laws, rules, and regulations discriminate against said State.

[1] Counsel for appellant conscientiously conceive this to be a complex question, but, as we view it, upon consideration of plain and unambiguous constitutional language (Const., Article 1, § 8; 21st Amendment, § 2), the answer is simple.

Well recognized 'Horn Book' rules of interpretation and construction are to be applied to constitutional amendments and, while an amended Constitution must be read as a whole, as if every part of it had been adopted at the same time and as one law, in accordance with the general rule that harmony must prevail, 'amendments are usually adopted for the express purpose of making changes in the existing system.' 11 Am. Jur., Constitutional Law, §§ 53, 54, and cases cited.

Article 1 of the Federal Constitution grants certain legislative powers and vests them in the Congress.

Article 1, § 8, provides that:

> Section 8. The Congress shall have power. . . . (Cl. 3) to regulate commerce with foreign nations,

and among the several States, and with the Indian Tribes.

The 21st Amendment reads:

> Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

This later provision of the Constitution limits the legislative power of the Congress, over the liquor traffic, and restores to the several States of the Union their sovereignty within this narrow field of commerce.

In the *Young's Market Co. Case,* 299 U. S. 59, the question was laid at rest when this Court said:

> The amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any State 'in violation of the laws thereof,' abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the amendment as saying in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the amendment, but a rewriting of it.

The question was raised by plaintiffs in *Joseph Triner Corporation v. Arundel* (District Court, Minnesota), 11 Fed. Supp. 145, and, on preliminary hearing, the court held that the 21st Amendment was not intended to except intoxicating liquors from provisions of the Commerce Clause. On final hearing, the court considered only questions involving the equal protection clause of the 14th Amendment.

On appeal to this Court, counsel for plaintiffs conceded that 'the Twenty-first Amendment relieved the States from the restrictions and limitations imposed upon them by the Commerce Clause.' *Mahoney v. Joseph Triner Corporation* (1938), 304 U. S. 401.

We respectfully submit that the question is settled.

[2] The question is settled unless there be some merit to appellant's contention, vigorously pressed, that the 'retaliatory type' of legislation, said to be exemplified in the Michigan statute (§ 40, *ante*), is a serious threat to the integrity of the Twenty-first Amendment itself.[7]

Counsel contends that the Michigan Act 'retaliates' against any State making use of the dispensation of the 21st Amendment, and seeks by economic reprisal to coerce its sister States from recourse to the Amendment; that it strikes directly at the integrity of the 21st Amendment itself, and accomplishes its nullification.

In short, it seems to be argued that, once the State of Indiana has taken advantage of Section 2 of the 21st Amendment, and in exercise of its constitutional rights thereunder has passed a law, or adopted a rule or regulation which in effect discriminates against the liquor commerce of the State of Michigan, its right to such dispensation becomes exclusive, and the sister State whose liquor commerce is thereby injured, has no remedy.

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[7] This point was urged in the brief of the Attorney General of Indiana, in the *Joseph Triner Co. Case*.

We are unable to perceive justice or equity in such a rule or doctrine, and counsel has cited no authority to sustain it.

Section 9 of the Indiana Act in substance requires a wholesaler of beer to secure a separate license for which a fee of one thousand dollars ($1,000) must be paid, and a surety bond in the penal sum of two thousand dollars ($2,000) must be posted, but this license does not authorize importation of beer. But the Indiana law further provides that any person holding a permit to wholesale alcoholic malt beverages under the Act may secure an additional permit to be known as a 'Port of Entry Permit,' which, when granted, authorizes said wholesaler to import into the State of Indiana alcoholic malt beverages which have been manufactured outside the State of Indiana, and transport, sell and deliver such imported alcoholic malt beverages within any county in the State of Indiana.

For this additional 'Port of Entry Permit,' a separate, and additional, license fee, in the sum of fifteen hundred dollars ($1500), is required to be paid, and an additional surety bond, in the penal sum of ten thousand dollars ($10,000) must be posted.

But the section further provides that not fewer than ten (10), or more than one hundred (100), 'Port of Entry Permits' shall be granted by the commission. And, as appears from affidavit,—a fact which counsel will not deny,—only thirteen (13) such 'Port of Entry Permits' had been issued on the date the Michigan regulation, designating Indiana, and other States, as discriminatory, was promulgated, December 14, 1937.

It is highly significant, we apprehend, that Indiana's 'Port of Entry Permits' are granted exclusively to its own domestic wholesaler-licensees, limited in number, and not to 'out-state' manufacturers or wholesalers, thereby encouraging, if not expressly creating, a 'closed corporation' with all of the privileges of a monopoly which may control importation of beer into that State; and that, under such a legislative scheme, the Michigan manufacturer of beer possesses no rights. In operation, therefore, the Indiana law effectually bars from that State, in such quantities as the domestic port of entry licensees may choose, any, or all, beer manufactured within a sister State. Such a law, we respectfully submit, does not operate to channelize beer coming into the State of Indiana, for the purpose of protecting or guarding the health, safety, or morals of its people, but has the ulterior economic motive of conferring upon the domestic manufacturer a special privilege.

The Indiana statute, then, is an economic sword, and not a shield.

Appellant's counsel are correct in stating that it has been the traditional attitude of this Court to set its face resolutely against 'economic barriers and trade wars between the States,' (citations, pp. 16, 17, appellant's brief) and in assuming there is no question that an interference with the interstate shipment of beer, in the manner provided in the challenged act and regulation was originally prohibited by the commerce clause of the Constitution (see, cases cited pp. 20, 21, appellant's brief).

But it would be strange doctrine, indeed, which might give to Indiana an exclusive dispensation, under the 21st Amendment, § 2, to encourage within its borders a domestic liquor monopoly possessing unrestrained power, to be exerted at the will or caprice of a favored few 'Port-of-Entry-Licensees,' to bar Michigan beer products, and which, once exercised by Indiana, would deny to Michigan a kindred dispensation under the same constitutional authority, to equalize such economic advantages by shielding her domestic beer industry from Indiana's attack.

For what plaintiff really seeks in *a court of equity*, is the right of unrestricted competition within the State of Michigan, while at the same time enjoying, with others, the benefit of discriminatory legislation at home.

Appellant's argument,—that the challenged Michigan legislation nullifies the 21st Amendment, requires no categorical reply, but breaks down under weight of the foregoing considerations.

VI

CONCLUSIONS, AND RELIEF SOUGHT

We respectfully submit that the decree of the lower court should be affirmed:

First: Because plaintiff, 'standing on the threshold,' is not a person within the jurisdiction of the State of Michigan, and may not invoke the 'equal protection clause' of the 14th Amendment.

Second: Because, since adoption of the 21st Amendment, the 'equal protection clause' does not operate upon the liquor laws of a State.

Third: Because, Section 40 of the Michigan Liquor Control Act, as amended, is a valid exercise of State police power, to equalize economic advantages enjoyed by other States under dispensation of the 21st Amendment.

Fourth: Because, under the 21st Amendment, such legislation imposes no unconstitutional burden on interstate commerce.

Fifth: Because no State of the Union may successfully claim a monopoly upon the dispensation granted by the 21st Amendment or, having exercised the sovereign powers restored thereby, deny them to others.

Respectfully submitted,

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FOR APPELLEE.

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SUPREME COURT OF THE UNITED STATES.

No. 130.—October Term, 1938.

Indianapolis Brewing Company, Inc.,
vs.
The Liquor Control Commission of the State of Michigan, et al.

Appeal from the District Court of the United States for the Eastern District of Michigan.

[January 3, 1939.]

Mr. Justice **Brandeis** delivered the opinion of the Court.

Indianapolis Brewing Company, Inc., an Indiana corporation, manufactures beer in that State. Under appropriate licenses it has for some years sold and shipped to dealers in Michigan its product in interstate commerce. In July, 1937, the Michigan Liquor Control Act was amended so as to prohibit Michigan dealers in beer from selling any beer manufactured in a state which by its laws discriminates against Michigan beer. By Section 40 of the amended Act, the Michigan Commission is directed to declare what states discriminate as that term is defined by the Act.[1] It named ten states.[2] Among these is Indiana, which by its Liquor Control Act

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[1] Amended sec. 40 of Michigan Act No. 281. Public Acts of 1937, p. 509, provides: ". . . The commission shall forthwith adopt a regulation designating the states, the laws, or the rules or regulations of which are found to require a licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in this state; or which deny the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license; . . . the regulation adopted shall prohibit all licensees from purchasing, receiving, possessing, or selling any beer manufactured in any state therein designated, said regulation to become effective ninety days after its adoption. Any licensee or person adversely affected shall be entitled to review by certiorari to the proper court the question as to whether the commission has acted illegally or in excess of authority in making its finding with respect to any state."

[2] The regulation of the Liquor Control Commission issued December 14, 1937, is as follows: Pursuant to Act No. 8, Public Acts, Extra session of the year 1933 of the State of Michigan, as amended by Act No. 241 of the Public Acts for the year 1935, and Act No. 281 of the Public Act for the year 1937, particularly Section 40 thereof, the Michigan Liquor Control Commission promulgates the following rule and regulation designating as discriminatory according to Section 40 of said Act the following States: Maine, Maryland, Nevada, Indiana, New Hampshire, North Carolina, Pennsylvania, Tennessee, Vermont, Washington. These designations are made after a careful examination of the laws and rules and regulations of the aforementioned states.

of 1935, as amended in 1937, prohibits licensed Indiana wholesaler
from importing any beer which is not their absolute property; an
requires that in order to secure the privilege of importing bee
from other states each must obtain a "port of entry" permit, o
which no fewer than ten and no more than one hundred are to b
granted, pay a license fee of $1500 and give a bond of $10,000, i
addition to the license fee and bond required of those who sell onl
Indiana beer.[3]

The Indianapolis Company, suing on behalf of itself and other
similarly situated, brought, in the federal court for eastern Mich
igan, this suit to enjoin the enforcement of that provision of th
Michigan law on the ground that it violates the Federal Constitu
tion. The members of the Michigan Liquor Control Commissio
and other officers of the State were made defendants. As a tem
porary, as well as a permanent, injunction was sought, a three-judg
court was convened to hear the application for a temporary injunc
tion. Defendants moved to dismiss the bill. It was conceded tha
if the law was unconstitutional the plaintiff was entitled to equi
able relief. No question except that of the constitutionality of t
law was presented. The court held the law valid; denied the tem
porary injunction; and dismissed the bill. 21 Fed. Supp. 969.

The plaintiff contends that although the Twenty-first Amen
ment declares:

> "The transportation or importation into any State, Territory
> possession of the United States for delivery or use therein of i
> toxicating liquors, in violation of the laws thereof, is hereby pr
> hibited."

the Michigan law should be held void as violating the commer
clause and the due process and equal protection clauses of t
Fourteenth Amendment. It characterizes the law as "retali
tory"; argues, among other things, that the Amendment may n
be interpreted as permitting retaliation; and insists that such i
terpretation would defeat its purpose, as thereby Michigan wou
be allowed to punish Indiana for doing what, under the rule a
plied in *State Board of Equalization* v. *Young's Market Co.*, 2
U. S. 59, 63, is permitted. Whether the Michigan law should n
more properly be described as a protective measure, we have
occasion to consider. For whatever its character, the law is val

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[3] Indiana Alcoholic Beverage Act of 1935, c. 226, amended by Act of 19
c. 197, secs. 9, 40(a), 41, Burns Revised Statutes 1933, Supp., Secs. 12-50
12-801, 12-901.

Since the Twenty-first Amendment, as held in the *Young* case, the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause; and, as held by that case and *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401, discrimination between domestic and imported intoxicating liquors, or between imported intoxicating liquors, is not prohibited by the equal protection clause. The further claim that the law violates the due process clause is also unfounded. The substantive power of the State to prevent the sale of intoxicating liquor is undoubted. *Mugler* v. *Kansas,* 123 U. S. 623.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.